

**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 23, 2013

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: September 22, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No:

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Date: September 11, 2013

Respondent.

Student Hearing Office, Room 2004  
Washington, D.C.

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**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 District of Columbia Public Schools (“DCPS”) has denied Student a free appropriate public education (“FAPE”) by failing to develop appropriate Individualized Education Programs (“IEP”), by failing to implement Student’s IEPs and by not conducting a Functional Behavioral Assessment, when requested by the parent.

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Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 19, 2013, named DCPS as respondent. The parties met for a resolution session on July 29, 2013 and were unable to reach an agreement. On August 23, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on September 11, 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. DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses EDUCATIONAL ADVOCATE, NONPUBLIC SCHOOL PROGRAM SUPERVISOR and Student. DCPS called as witnesses PROGRAM SPECIALIST, SPECIAL EDUCATION COORDINATOR, and SOCIAL WORKER. Petitioner's Exhibits P-1 through P-32 and DCPS' Exhibits R-1 and R-2 were admitted into evidence without objection. Counsel for Petitioner made an opening statement. Counsel for both parties made 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 are:

- Whether DCPS' May 8, 2012, March 28, 2013 and May 22, 2013 IEPs were inappropriate for Student because the IEPs failed to provide Student with a

full-time therapeutic setting for a child with an Emotional Disability;

- Whether DCPS failed to implement Student’s IEPs during the 2012-2013 school year by not providing the hours of specialized instruction specified in the IEPs; and
- Whether DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment and develop a behavior intervention plan when requested by Parent during the 2012-2013 school year.

For relief, Petitioner seeks an order requiring DCPS to fund Student’s full-time private placement at Nonpublic School and to complete a functional behavioral assessment (“FBA”) and behavior intervention plan (“BIP”) for Student. In addition, Petitioner seeks an award of compensatory education to compensate Student for harm allegedly resulting from DCPS’ failure to provide Student a full-time therapeutic educational placement and its alleged failure to implement IEP 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. Student is a child with a disability, eligible for special education and related services, under the disability, Emotional Disturbance (“ED”). Exhibit P-1.

3. For the 2012-2013 school year, Student was enrolled in the GRADE at CITY MIDDLE SCHOOL 1. Testimony of Student.

4. When Student was in the 4<sup>th</sup> grade, medical doctor diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”). Testimony of Mother.

5. Since 2011, Student has been followed as an outpatient by MENTAL HEALTH

FACILITY. Student has been prescribed psychiatric medications. Exhibit P-13. After the end of the 2011-2012 school year, a community support worker started coming to Student's home to provide services. Testimony of Mother.

6. In November 2011, Student transferred to City Middle School 1 from another DCPS middle school because of a serious discipline incident with another student. Around January or February of 2012, Student's in-school behavior became a problem. became very disrespectful to teachers, was not doing class work, had outbursts and walked out of classes. That school year, Student had many in-school and out-of-school disciplinary suspensions. Testimony of Mother.

7. On March 29, 2012, a City Middle School 1 examiner conducted an educational evaluation of Student, using the Woodcock-Johnson III Tests of Achievement. For Written Expression, Student's academic achievement tested in the Average range. Student's overall Mathematics score was within the Low Average range. performance was Average on tasks requiring the ability to analyze and solve applied mathematics problems. performance was Limited on tasks requiring speed and accuracy, when performing basic arithmetic operations. Student's overall Written Language standard score was within the Low Average range. performance was Average on tasks requiring the ability to write rapidly with ease. performance was Very Limited on tasks requiring the ability to spell orally-presented words correctly. Student's mathematics calculation skills standard score was within the Low to Low Average range. mathematics calculation skills were Limited. Student's Reading standard score was within the Very Low to Low range. overall reading ability was very limited. The examiner reported that reading tasks above the grade 3.2 level would be quite difficult for Student. The examiner summarized that, when compared to others at grade level, Student's

performance was Average in Written Expression, Low Average in Mathematics and Written Language, Low in math calculation skills and Very Low in Broad Reading. Exhibit P-10.

8. On May 8, 2012, the City Middle School 1 multidisciplinary team (“MDT”) determined that Student was eligible for special education and related services under the disability Other Health Impairment, Attention Deficit with Hyperactivity Disorder (“OHI-ADHD”), based upon a February 6, 2012 report from Student’s physician. Exhibit R-1.

9. Student’s initial, May 8, 2012, IEP set annual goals for Mathematics, Reading and Written Expression. The IEP provided Student 20.5 hours per week of Specialized Instruction in the General Education setting. The IEP did not provide behavioral support or other Related Services. Exhibit P-8.

10. At City Middle School 1, after the May 8, 2012 IEP was developed, Student received small group instruction from the special education teacher. Student’s English and Sciences classes were co-taught by general education and special education teachers. Mathematics was offered in a math lab program taught by a general education teacher.

Testimony of Special Education Coordinator.

11. Student received final grades of “D” in all of classes for the 2011-2012 school year, except for a “P” in Advisory. Testimony of Mother, Exhibit P-19.

12. The DCPS 2012-2013 school year for middle school ran from August 27, 2012 through June 20, 2013. The Second Advisory Period ended on January 25, 2013. Hearing Officer Notice.

13. The 2012-2013 school year started “terrible” for Student. Student was involved in arguments, misbehavior, fighting with peers and walking out of class. Mother immediately started receiving telephone calls from school staff about Student’s behavior. Testimony of

Mother.

14. City Middle School 1's December 7, 2012 Report to Parents on Student Progress reported that Student was failing, or there was a possibility of failing, Science, English, Mathematics, Computer Applications and Music. Exhibit P-21.

15. City Middle School 1's February 28, 2013 Report to Parents on Student Progress reported that Student was failing, or there was a possibility of failing, Science, English, Mathematics, World History and Spanish. Exhibit P-16.

16. On March 28, 2013, Student's IEP team convened at City Middle School 1 for an IEP review. The Present Levels of Performance reported by the IEP team demonstrated that Student's behavior was impeding learning. According to teacher reports, Student had not made progress with math skills for the school year due to poor attendance. Student had not made much progress in reading due to poor attendance and behavior issues. could be easily distracted and had difficulty getting along with classmates. had periods of not being able to do any work because of headaches. In Written Expression, Student was reported to become frustrated and "give up," when did not know how to start writing activity. teacher reported that "When gets like this, there is no helping with the assignment. usually puts head down and refuses to work." Student's poor attendance was also reported to have hampered progress in Written Expression. Exhibit P-7.

17. In the March 28, 2013 IEP, the IEP team reduced Student's Specialized Instruction from 20.5 hours per week to 15 hours per week, all in the General Education setting. Student was not provided Behavioral Support or other Related Services in the IEP. Exhibit P-7.

18. Student failed all of classes for the 2012-2013 school year, except for World History (D) and Advisory (P). had numerous class absences over the school year, including

72 absences in Science, 80 absences in English, and 50 absences in Mathematics. Exhibit P-14.  
Student was, nonetheless, promoted to the next grade. Testimony of Mother.

19. On February 11, 2013, Student received a psychiatric evaluation at Mental Health Facility due to history of behavior problems. In an April 18, 2013 report, the examining physician diagnosed Student with ADHD, Oppositional Defiant Disorder (“ODD”) and Mood Disorder - Not Otherwise Specified. The Plan of Treatment was for further evaluation, psychiatric medications and therapy. Exhibit P-13.

20. Student’s City Middle School 1 IEP team convened again on May 22, 2013. disability classification was changed from OHI to ED. For the first time, the IEP team addressed Emotional, Social and Behavioral Development as an Area of Concern in the IEP. The team reported that Student’s disruptive behaviors and inability to relate well with others continued to prevent from successfully accessing the general education curriculum. The IEP team changed Student’s Specialized Instruction services to 18 hours per week, outside of General Education, and added 120 minutes per month of Behavioral Support Services, outside of General Education. Exhibit P-5. The “Begin Date” for the increased services, specified in the IEP, was May 22, 2013. However, the IEP team agreed that Student’s service changes would be implemented at the beginning of the 2013-2014 school year. Exhibit P-6.

21. Student’s May 22, 2013 IEP could have been implemented at City Middle School 1 in its ACADEMY PROGRAM. The Academy Program is a self-contained program in the middle school, with a low student-to-teacher ratio, which provides core academic courses to children with disabilities. Testimony of Special Education Coordinator.

22. DCPS did not conduct an FBA or develop a BIP for Student during the 2012-2013 school year. At the May 22, 2013 IEP meeting, the IEP team decided to conduct an FBA at the beginning of the next school year. Testimony of Social Worker.

23. DCPS reconvened Student's IEP team on August 28, 2013. Educational Advocate attended this meeting. The IEP team increased Student's Specialized Instruction to 27.5 hours per week outside of General Education. DCPS offered to place Student in the new BEHAVIORAL SUPPORT PROGRAM at City Middle School 2. Exhibits P-1, P-2.

24. Behavioral Support Program at City Middle School 2 is a full-time self-contained program for children with emotional disabilities. The program is located on the fourth floor of a regular public middle school. There are two classrooms with a maximum of 10 students in each classroom. Each classroom is staffed by a teacher certified in special education, a behavioral teacher and a paraprofessional. Other teachers rotate into the classrooms to teach specials (non-core) subjects. Reading intervention programs, including Read 180 and System 44, are available in the classrooms. Related services providers serve students at the 4<sup>th</sup> floor site. The Behavioral Support Program space is isolated from the rest of the school and the students in the program have no in-school contact with non-disabled peers. Students in the Behavioral Support Program enter the school through the main entrance, where they are met by program staff and escorted to the program facility on the fourth floor. Testimony of Program Specialist. Mother visited the Behavioral Support Program facility in August 2013. At the time, the program had not yet begun for the 2013-2014 school year. Testimony of Mother.

25. On August 28, 2013, DCPS issued a Prior Written Notice, which proposed Student's placement at City Middle School 2. Exhibit P-4.

26. Nonpublic School is a private school in suburban Virginia, serving children in Grades 1 through 12, with disabilities including ED, Learning Disorders, Intellectual Disabilities, Autism Spectrum Disorder and Multiple Disabilities. Approximately 40 percent of the Students at Nonpublic School have an ED disability. The classrooms at Nonpublic School have a maximum of 9 students and are staffed by a teacher and an assistant teacher. Nonpublic School offers a lot of support services, including individual and group counseling, school-wide behavioral support, crisis intervention and related services. The tuition cost at Nonpublic School is \$38,000 per year. There is an additional hourly charge for counseling services. Students at Nonpublic School have no in-school contact with non-disabled peers. Testimony of Program Supervisor. Nonpublic School is on the DC Office of the State Superintendent of Education’s (“OSSE”) list of approved nonpublic day schools. Hearing Officer Notice.

27. Student and Mother have visited Nonpublic School, where they were interviewed and were given a tour of the facility. Student has been accepted for admission by Nonpublic School for the 2013-2014 school year. Testimony of Program Supervisor.

### **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

1. *Were DCPS' May 8, 2012, March 28, 2013 and May 22, 2013 IEPs inappropriate for Student because the IEPs failed to provide Student with a full-time therapeutic setting for a child with an Emotional Disability?*

Student was first found eligible for special education services, based upon OHI-ADHD disability, at a May 8, 2012 City Middle School 1 eligibility meeting. At a May 22, 2013 IEP meeting, Student's disability classification was changed from OHI to ED. At an August 28, 2013 MDT meeting, Student was, for the first time, offered full-time Specialized Instruction services in a fully self-contained setting. Petitioner contends that as early as the May 8, 2012 initial IEP meeting, Student's IEP should have provided a full-time therapeutic placement because of emotional disability.

The IDEA requires that to provide a FAPE, "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). The IEP issues asserted by Petitioner in this case concern only the second prong of the inquiry.

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*, 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).

#### May 8, 2012 IEP

The measure and adequacy of an IEP is determined as of the time it is offered to the student. *See S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008). When Student’s first IEP was developed in May 2012, identified disability was ADHD. scores on the March 29, 2012 educational evaluation indicated that academic skills varied from the Very Low range (Broad Reading) up to the Average range (Written Expression) for students at grade level. According to the information in the May 8, 2012 IEP, Student’s severe emotional/behavioral issues, described in later IEPs, had not yet appeared. For example, the May 8, 2012 IEP team reported, for Student’s Present Level of Performance in Mathematics, that behaviorally was “a respectful student and follows classroom rules 95% of the time.”

The Petitioner has not shown that the 20.5 hours per week of Specialized Instruction provided in the May 8, 2012 IEP were not sufficient – at the time the IEP was offered to Student – to enable Student to receive educational benefits. *See, e.g., N.T., supra.*

March 28, 2013 IEP

The IDEA requires that a Student’s IEP team revises the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general curriculum, the results of any reevaluation, information about the Student provided by the parents, the Student’s anticipated needs and other matters. *See* 34 CFR § 300.324(b). In addition, the IDEA regulations require the IEP team, in the case of a student whose behavior impedes the student’s learning or that of others, to consider the use of positive behavioral supports, and other strategies to address that behavior. *See* 34 CFR § 300.321(a)(2)(i). According to Mother, Student’s 2012-2013 school year was “terrible” from the start. Mother immediately started receiving daily telephone calls from the school about Student’s behavior issues, including arguments, fights, and walking out of school. On December 7, 2012 and February 28, 2013 report cards, Student was reported to be failing, or at risk of failing, all of academic courses. Obviously, Student was not making satisfactory progress on May 8, 2012 IEP goals. I find that by the end of the Second Advisory, January 25, 2013, Student’s IEP should have been revised to address lack of expected progress under initial, May 8, 2012, IEP

When Student’s IEP team did meet on March 28, 2013, it received reports that Student had not made expected progress in math or reading due to poor attendance, that in writing instruction would get frustrated and refuse to work and that Student could be easily distracted and had difficulty getting along with classmates. The IEP team, presumably, also reviewed Student’s report cards, which reflected that was failing all of courses.

Although the IEP team had this plethora of information and data that Student was not making progress toward the annual goals in May 8, 2012 IEP or in the general curriculum, instead of developing additional and/or alternative special education and related services to address Student's needs, the IEP team offered Student no behavioral support services and even reduced Specialized Instruction services from 20.5 hours to 15 hours per week. Unsurprisingly, for the 2012-2013 school year, Student failed 6 of 7 academic courses. I conclude that Student was denied a FAPE by DCPS' failure to timely revise IEP after the Second Advisory and by the inadequate special education and related services in the March 28, 2013 IEP, which was not reasonably calculated to enable Student to receive educational benefits.<sup>2</sup>

#### May 22, 2013 IEP

Student's IEP team reconvened on May 22, 2013, after City Middle School 1 received Mental Health Facility's April 18, 2013 psychiatric evaluation of Student, in which the psychiatrist had diagnosed Student with ADHD, ODD and a Mood Disorder. At this meeting, Student's IEP disability was changed from OHI to ED. The revised IEP provided Student 18 hours per week of Specialized Instruction, outside of General Education, and 120 minutes per month of Behavioral Support services. At the due process hearing, Petitioner offered no competent evidence that this level of services was not reasonably calculated to enable Student to receive educational benefits. However the IEP team agreed that the revised services would commence only at the beginning of the 2013-2014 school year. DCPS' witness, Special Education Coordinator, testified that the revised IEP should have been implemented as soon as consent was obtained from the Petitioner. I find that City Middle School's postponement of the more intensive special education and related services, which the IEP team determined that

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<sup>2</sup> Although I agree with Petitioner that the March 28, 2013 IEP denied Student a FAPE, Student's alleged requirement for a "full-time therapeutic setting for a child with an emotional disability" was not established by any competent evidence offered at the due process hearing.

Student required, constituted a failure to implement the May 22, 2013 IEP, which I address below in this decision.

2. *Did DCPS fail to implement Student's IEPs during the 2012-2013 school year by not providing the hours of specialized instruction specified in the IEPs?*

Student's May 8, 2012 and March 28, 2013 IEPs provided that Student would received 20.5 hours per week and 15 hours per week, respectively, of Specialized Instruction in the General Education setting. Special Education Coordinator testified that these services were provided to Student in English and Science classes, which were co-taught by special education teachers, and by a special education teacher who rotated in the Math Lab class. Petitioner offered no evidence to the contrary. Therefore, I find that Petitioner has not shown that DCPS failed to provide the Specialized Instruction services required by the May 8, 2012 or March 28, 2013 IEPs.

Student's May 22, 2013 IEP provided that would receive 18 hours per week of Specialized Instruction outside of the General Education setting, with a "Begin Date" of May 22, 2013. This represented not only a small increase in Specialized Instruction, but also a change in setting from full inclusion to Specialized Instruction in a self-contained classroom. As discussed above in this decision, the IEP team decided that Student's more intensive Specialized Instruction services would not begin until the following, 2013-2014, school year.

Special Education Coordinator testified that Student's revised IEP should have been implemented the next business day after Mother signed consent for services. However, DCPS schools were closed on May 27, 2013 for Memorial Day. I find that a reasonable Begin Date to implement the May 22, 2013 IEP would have been May 28, 2013, the day after the Memorial Day holiday. I conclude that DCPS failed to offer Student the self-contained Specialized Instruction, required by the May 22, 2013 IEP, for the last approximately 3½ weeks

of the school year, which ended on June 20, 2013.

In order to prevail on a “failure to implement” claim, 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”. *Johnson v. District of Columbia*, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (citations and internal quotations omitted.) “Courts applying this standard ‘have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.’” *Id.*, quoting *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C.2011). In this case, DCPS failed to provide Student the self-contained Specialized Instruction services, required by the May 22, 2013 IEP, for 3½ weeks, or some 63 hours. I find this this constituted a failure to implement a substantial provision of Student’s IEP. Accordingly, I conclude that Student was denied a FAPE by DCPS’ failure to implement the more intensive Specialized Instruction services, required by the May 22, 2013 IEP, at the end of the 2012-2013 school year.

3. *Did DCPS deny Student a FAPE by failing to conduct an FBA and develop a BIP when requested by Parent during the 2012-2013 school year?*

The last issue asserted by Petitioner is that DCPS denied Student a FAPE by failing to conduct a FBA and develop a BIP when requested by \_\_\_\_\_ during the 2012-2013 school year. There was no evidence at the due process hearing that Petitioner requested DCPS or City Middle School to conduct an FBA of Student, until that request was made by Educational Advocate at the August 28, 2013 IEP meeting. Notwithstanding, the IDEA requires, in the case of a child whose behavior impedes the child’s learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. See 34 CFR § 300.324(a)(2)(i). In *Harris v. District of Columbia*, 561 F.Supp.2d 63

(D.D.C.2008), the Court explained that “the IEP team must, in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” *Id.* at 68. In *Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011) the Court stated “it is important to note that ‘the IDEA . . . recognizes that the quality of a child’s education is inextricably linked to that child’s behavior,’ and ‘[an] FBA is essential to addressing a child’s behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.’” *Id.*, quoting *Harris v. District of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C.2008).

In this case, Student’s March 28, 2013 IEP team knew that Student’s behavior and attendance problems impeded learning. The IEP team reported in the March 28, 2013 IEP that Student had not made expected progress due to poor attendance and behavior issues. Nonetheless, an FBA was not conducted and DCPS did not offer Student any behavioral interventions or supports until the May 22, 2013 IEP meeting. I find that DCPS’ failure to complete a FBA/BIP at the time of the March 28, 2013 IEP meeting constituted denial of a FAPE.

#### Remedy

In this decision, I have found that Student was denied a FAPE by (i) DCPS’ failure to timely revise Student’s May 8, 2012 IEP to address lack of expected progress, (ii) by the inappropriate March 28, 2013 IEP which was not reasonably calculated to provide educational benefits, (iii) by DCPS’ failure to adopt positive behavioral interventions and supports to address Student’s behavior issues and (iv) by DCPS’ failure to timely implement the Specialized Instruction services specified in Student’s May 22, 2013 IEP. For requested remedy, Petitioner seeks an order for DCPS to fund Student’s placement at Nonpublic School and an

award of compensatory education.

#### Private School Placement

An inadequate IEP is a necessary but insufficient condition for private school placement. Although DCPS must pay for private school placement “[i]f no suitable public school is available[,] . . . if there is an appropriate public school program available . . . the District 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 the present case, at the August 28, 2013 MDT meeting, DCPS offered to place Student in the full-time Behavioral Support Program at City Middle School 2. At the May 22, 2013 IEP meeting, DCPS had offered Student an 18 hour per week, outside of General Education, placement at City Middle School 1, which the school could have fulfilled at its Academy Program. At the due process hearing, Petitioner did not attempt to show that either of these public school programs would not have been appropriate for Student. *Cf. N.T., supra* (If DCPS had been unwilling or unable to modify the IEP to meet N.T.’s needs for small group instruction, then private placement and reimbursement might be an appropriate remedy.) I conclude therefore that, because there is a public school program available for Student for the 2013-2014 school year, and Petitioner has not shown that this program would not be appropriate, DCPS is not required to pay for Student’s placement at Nonpublic School.

#### Compensatory Education

Petitioner also seeks an award of compensatory education as compensation for the educational harm, allegedly suffered by Student, as a result of DCPS’ denial of FAPE during the 2012-2013 school year. Compensatory education awards fit comfortably within the “broad discretion” of hearing officers’ fashioning and enforcing IDEA remedies. *Cf. Reid, supra*, 401

F.3d at 523. “The IDEA gives [hearing officers] ‘broad discretion’ to award compensatory education as an ‘equitable remedy’ for students who have been denied a FAPE. *Reid*, 401 F.3d at 522–23 (quoting *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15–16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)). The ‘ultimate award’ must ‘provide the educational benefits that likely would have accrued from special education services’ that the school district ‘should have supplied in the first place.’ *Id.* at 524. A compensatory award must ‘rely on individualized assessments’ after a ‘fact-specific’ inquiry. *Id.* ‘In formulating a new compensatory education award, the hearing officer must determine what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’ *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C.2006) (quoting *Reid*, 401 F.3d at 527).” *Turner v. District of Columbia*, 2013 WL 3324358, 10 (D.D.C. July 2, 2013).

Petitioner has proposed a compensatory education plan for Student devised by Educational Advocate (Exhibit P-27). This plan proposes an award of 120 hours of tutoring – 20 hours for each of the core courses that Student failed over the 2012-2013 school year, including Science, English, Mathematic, Computer Applications, Music and Spanish. Educational Advocate’s rationale is that Student was capable of obtaining passing grades in 2012-2013 courses if had “proper modifications and services provided in the right setting,” and the proposed tutoring services would address the course content that Student did not learn during the school year. I find that these proposed tutoring services would be an appropriate, equitable compensatory education remedy and I will order DCPS to provide Student 120 hours of tutoring in those academic areas, as may be reasonably agreed between Petitioner and DCPS, that would be beneficial to Student.<sup>3</sup> Because DCPS has offered to immediately place Student in a full-

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<sup>3</sup> Education Consultant opined in proposed plan that Student should receive “independent” tutoring. I find no basis for awarding independent tutoring instead of DCPS-furnished tutoring.

time, self-contained program for children with emotional disabilities, I find it is not appropriate to order further compensatory relief for DCPS' failure, during the 2012-2013 school year, to conduct an FBA or provide behavioral interventions to address Student's behavioral difficulties.

### ORDER

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

1. Within 20 school days of the date of this order, subject to obtaining parental consent, DCPS, shall conduct a functional behavioral assessment of Student and, upon completion, shall promptly convene Student's IEP team to develop appropriate behavior interventions and supports to address behavior and class attendance issues;
2. As compensatory education relief, DCPS shall, during the 2013-2014 school year, provide 120 hours of 1:1 tutoring for Student, in those academic subjects and on a schedule as may be reasonably agreed upon by Petitioner and the agency. The tutoring services shall be provided by educator(s) qualified in the content areas and experienced working with children with emotional disabilities; and
3. All other relief requested by the Petitioner in this matter is denied.

Date: September 22, 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).