

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
December 30, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: December 30, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
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 GUARDIAN), 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 Student has been denied a free appropriate public education (FAPE) by the failure of Respondent District of Columbia Public Schools (DCPS) to provide him appropriate Individualized Education Programs (IEPs) and educational placements since September 2012; by DCPS' failing to timely conduct special education reevaluations requested by the Guardian; by DCPS' not

¹ Personal identification information is provided in Appendix A.

ensuring the Guardian's full participation in a November 2012 IEP meeting, and by DCPS' failing to take appropriate measures in the current school year to address Student's school avoidance issues.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 1, 2014, named DCPS as Respondent. The parties met for resolution sessions on July 15, 2014 and October 20, 2014 and did not reach an agreement. On July 14, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing was originally scheduled for August 27 and 28, 2014. At the request of the Petitioner for health reasons, the Chief Hearing Officer entered an Interim Continuance Order, which continued the due process hearing to October 1 and 2, 2014 and extended the due date for the final decision to October 17, 2014. Before the due process hearing opened on October 1, 2014, the parties agreed to postpone the hearing and continue settlement discussions. When those efforts did not resolve the dispute, on October 16, 2014, Petitioner requested and was granted leave to file an amended due process complaint. The timelines for DCPS to respond to the amended complaint, the resolution period and the due date for issuance of the Hearing Officer Determination were started anew, as of October 16, 2014. The due date for the final decision in this case was extended to December 30, 2014. Following a prehearing conference on October 30, 2014, the due process hearing was rescheduled for December 9 and 10, 2014. I entered a revised Prehearing Order on October 30, 2014.

The due process hearing was held before this Impartial Hearing Officer on December 9 and 10, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording

device.² The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioner testified and called as witnesses MENTOR, NONPUBLIC SCHOOL ASSISTANT PRINCIPAL, PARALEGAL, CLINICAL PSYCHOLOGIST and EDUCATIONAL ADVOCATE. DCPS called as witnesses CITY HIGH SCHOOL SCHOOL PSYCHOLOGIST, COMPLIANCE CASE MANAGER, and SCHOOL SOCIAL WORKER. Petitioner's Exhibits P-1 through P-57 were admitted into evidence, with the exceptions of Exhibits P-45, P-52, and P-56, which were not offered. Exhibits P-4 through P-9, P-18 and P-55 were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-37 were admitted into evidence without objection. In lieu of closing arguments, at the request of both parties, I granted counsel leave until December 18, 2014 to file written closing statements. Counsel for both parties filed post-hearing briefs.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the October 30, 2014 revised Prehearing Order:

- Whether DCPS denied the student a free appropriate public education (FAPE) by providing the student with inappropriate IEPs in September 2012 and November of 2012, because those IEPs provided insufficient hours of Specialized Instruction, the annual goals and present levels of performance were not based upon current data, and the IEPs lacked adequate classroom and testing

² Due to technical problems with the District of Columbia government's computer network on the first day of the hearing, portions of opening oral argument were not recorded.

accommodations;

– Whether DCPS denied the student a FAPE by failing to properly invite the Guardian to the November 14, 2012 meeting and holding the meeting without her participation without making appropriate efforts to include her, as required under IDEA;

– Whether DCPS denied the student a FAPE by failing to conduct psychological and Functional Behavioral Assessment (FBA) re-evaluations of the student, timely following the Guardian's February 1, 2013 request for such evaluations;

– Whether DCPS denied the student a FAPE by failing to provide him an appropriate IEP at the December 2013 IEP meeting because that IEP lacked sufficient hours of Specialized Instruction, including Specialized Instruction outside of general education, the annual goals were not individualized to Student's levels and needs, and the IEP lacked a Behavior Intervention Plan (BIP);

– Whether DCPS denied the student a FAPE by failing to provide him an appropriate IEP when it revised his IEP on June 9, 2014 because that IEP lacked a BIP, provided insufficient hours of Specialized Instruction, including Specialized Instruction outside of general education, and the annual goals were not individualized to Student's levels and needs and did not correspond to his present levels baselines;

– Whether DCPS denied the student a FAPE by failing to include the Guardian and the IEP team in the decision of the specific kind of educational program/ placement that the student would be placed in – the Behavior Education Support (BES) program – at CITY HIGH SCHOOL for the 2014-2015 school year;

– Whether DCPS failed to provide the student with an educational placement/school for the 2014-2015 school year that could implement the IEP as written and is not more restrictive than what the student's current IEP allows for;

– Whether DCPS denied Student a FAPE by failing to provide him with an appropriate therapeutic, small, and structured educational program for the 2014-2015 school year;

– Whether DCPS denied the student a FAPE following the start of the 2014-2015 school year by failing to take appropriate steps to address the student's lack of attendance at school; and

– Whether DCPS denied the student a FAPE at a meeting held on October 14, 2014 by not taking into account new data provided by the IEP team regarding the student's school phobia/ anxiety/ depression in his educational

programming/placement, by refusing to increase the student's hours of specialized instruction outside of the general education setting, by keeping the Student in the BES program, a more restrictive program than what the IEP requires; and by failing to ensure that all required members of the IEP team attended the meeting.

For relief, Petitioner requests that DCPS be ordered to return Student's IEP service hours to the pre-September 2012 levels of specialized instruction and related services, including a minimum of 30 hours of specialized instruction outside of the general education setting, and 1 hour per week of behavioral support services outside of the general education setting; that the IEP goals and baselines be revised to address Student's identified deficit areas, regardless of whether those deficits match up with the 9th grade common core standards; that the IEP team be required to revise the accommodation section of Student's IEP, and in the absence of data showing Student no longer requires certain accommodations, that the IEP team provide Student with the accommodations he had on his IEP before August of 2012; and that DCPS be ordered to place and fund Student at Nonpublic School with school transportation. In the alternative, Petitioner requests that DCPS be ordered to convene an IEP meeting for the purpose of increasing Student's hours of specialized instruction to 27.5 hours per week outside of the general education setting and 1 hour per week of behavioral support outside of the general education setting, of determining whether it is appropriate to place Student in the Behavior Education Support (BES) program or to offer Student a placement that can implement the full-time out of general education IEP and employing a direct teaching approach, using content-certified teachers and special education teachers. Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in this case.

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 youth, resides in the District of Columbia with Petitioner. Petitioner is Student's great grandmother and his legal guardian. Testimony of Petitioner.

2. Student is a "child with a disability" in need of special education and related services, as defined by the IDEA. His primary disability classification is Emotional Disturbance. Exhibit P-27.

3. Beginning in October 2007, through the 2009-2010 school year, Student attended SCHOOL A in suburban Maryland. Exhibit P-39.

4. In January 2010, DCPS conducted a Functional Behavior Assessment (FBA) of Student and developed a Behavior Intervention Plan (BIP). The behaviors of concern reported in the FBA were being out of seat, defiance, moodiness, social skills, late assignments, noncompliance, depression, being off task, making excuses and poor motivation. Exhibit P-38.

5. In 2010, Student was referred by DCPS for a comprehensive psychological evaluation. In a May 28, 2010 Comprehensive Psychological Evaluation report, the DCPS psychologists reported that on cognitive functioning tested with the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), Student's scores on the Verbal Comprehension Index and Perceptual Reasoning Index fell in the Average range. His scores on the Working Memory Index fell in the High Average range. His scores on the Processing Speed Index fell in the Low Average range. Student's Visual-Motor functioning tested in the Average range. On educational testing, using the

Wechsler Individual Achievement Tests – Second Edition (WIAT-II), Student's composite scores were in the Average range for Reading, Borderline range for Mathematics and Low Average Range for Oral Language. On testing of attentional functioning, Student's functioning was reported to be within normal limits for most domains, but Student was then on medicines prescribed for Attention-Deficit/Hyperactivity Disorder (ADHD). To definitively rule out an ADHD diagnosis, the examiners recommended reassessing Student when he was not being medicated.

Exhibit P-39.

6. In the May 28, 2010 psychological evaluation report, the DCPS psychologists were most concerned with Student's socio-emotional functioning. They reported that behavioral measures placed Student's functioning in the significant range in almost all domains, that it appeared that Student was a deeply troubled and unhappy child in need of substantial support and intervention; that Student frequently verbalized suicidal ideation and that he should be provided therapeutic interventions to mitigate depressive symptoms and that he be monitored closely for safety. Because Student's functioning prevented him from independently accessing the curriculum, the DCPS psychologists "strongly recommended" that Student be provided with a 1:1 aide until he became more stable. The DCPS psychologists determined that Student met eligibility criteria under the IDEA as a student with an ED and that he also met the criteria for an SLD in the areas of Mathematics and Written Expression. Exhibit P-39.

7. Student transferred to SCHOOL B for the 2010-2011 school year. At an October 14, 2010 multidisciplinary team (MDT) meeting, the School B MDT team completed a triennial special education reevaluation of Student and determined that Student continued to meet IDEA eligibility requirements based upon an ED disability.

Exhibit P-7.

8. Student matriculated to SCHOOL C for the 2011-2012 school year. Student's October 13, 2011 IEP at School C provided for 31 hours per week of Specialized Instruction and one hour per week of Behavioral Support Services, all outside general education. The IEP provided that Student required Assistive Technology for learning and studying. In the IEP Least Restrictive Environment (LRE) narrative, the IEP team stated that student required a structured classroom setting with a low student to teacher ratio for academic instruction. Exhibit P-10. At the end of the 2011-2012 school year, Student was reported as "Mastered" or "Progressing" on all IEP academic and behavioral annual goals. Exhibit R-2.

9. In the spring of the 2011-2012 school year, Mentor began to serve as Student's volunteer mentor. Her role has been to help with school work, take Student to entertainment events on weekends, take Student shopping for school and the like. Student is not a professional educator. Testimony of Mentor.

10. Student transferred to School D for the 2012-2013 School Year. Mentor took all of Student's paperwork to School D over the summer of 2012. In August 2012, Mentor accompanied Student and Guardian to a Back-to-School barbeque event at School D. At that event, Mentor met LEA SCHOOL REP. LEA School Rep told Mentor that School D could absolutely accommodate Student's needs. Mentor wrote LEA Rep to request an IEP team meeting for Student. Testimony of Mentor.

11. An IEP team meeting for Student was convened at School D on September 14, 2012. Petitioner and Mentor attended the meeting. They were told that School D did not have the resources to provide the level of support offered to Student at School C. The IEP team decided to reduce Student's Special Education Services from full-time to

fifteen hours per week, of which 7.5 hours would be in the general education setting. At the recommendation of School Social Worker, Student's Behavioral Support Services were continued at 240 minutes per month. Testimony of Mentor, Exhibits R-4, P-11, P12, R-5.

12. On October 3, 2012, Student's Social Studies/Homeroom teacher wrote Mentor by email that Student was doing a great job in her class, that he had a C+ average, that he was quiet, but seemed well-adjusted. On October 2, 2012, Student's special education teacher wrote Mentor by email that Student was doing fine in her class, that he tried hard to do all his assignments, that he would ask questions if he did not understand the assignment, that there were no missing assignments or homework and that he was a pleasant student in class. Exhibit P-2.

13. Student's grades for the first quarter of the 2012-2013 school year at School D were C's and higher except for a D in science and an F in Spanish. His grades at the end of the second quarter were C- and higher except for a D+ in Science. His grades at the end of the third quarter were C's and above except a D in MS Support and F's in History/Geography and in Spanish. His grades for the fourth quarter were C-'s and above except for D's in Pre-Algebra, MS Support and Spanish. His final grades for the 2012-2013 school year were D's in History/Geography, MS Support and Spanish and C's or higher in his other courses. Exhibit P-32.

14. School D convened an IEP annual review meeting for Student on November 14, 2012. In early November, a letter of invitation was sent home to Petitioner in Student's book bag. Exhibit R-7. On November 13, 2012, Mentor emailed DCPS Rep to advise that the Guardian might not be able to attend the meeting and to ask if she could attend in her place. DCPS Rep responded that Mentor was welcome to

participate, but that she needed the Guardian to participate by telephone for about 5 to 10 minutes. Mentor responded that the Guardian would not be able to attend the meeting in person, but the IEP team could try to reach her by telephone. Exhibit P-2. At the November 14, 2012 IEP meeting, the Guardian was reached by telephone and participated for a few minutes. Mentor attended the meeting in person. Testimony of Mentor, Exhibit P-12.

15. At the November 14, 2012 IEP annual review meeting, Student's special education teacher shared Student's Paced Interim Assessments (PIA) scores and work samples. She stated that Student was performing good in her class. The social studies/homeroom teacher stated that Student had a B in her class. The school social worker shared that Student had improved in her small-group counseling sessions. The IEP team agreed that Student's current IEP was appropriate, but reduced his Special Education Services to eight hours per week, including one hour outside general education, and reduced his Behavioral Support Services to 120 minutes per month. Exhibits P-12, P-13.

16. On February 1, 2013, Petitioner faxed a written request to LEA Rep for a comprehensive reevaluation of Student, including a comprehensive psychological evaluation, an FBA, and a Social History. She stated that the request was made because the information used to build Student's current IEP did not accurately reflect his current needs. Exhibit P-2. The school did not respond to the request. After several email follow-ups, School D's new special education coordinator responded on May 8, 2013 that the school would start the reevaluation process in September 2013 because Student's current evaluation did not expire until October 2013 and the school could not start the evaluation process so near to the end of the 2012-2013 school year. Exhibit P-

2.

17. Student's PIA scores for the 2012-2013 school year showed performance that was below and above class average in reading and math. His reading scores were somewhat better than his mathematics scores. Student's DC Comprehensive Assessment System (DC-CAS) scores for 2012-2013 were at the Basic level in Reading and Mathematics (somewhat below grade level) and at the Proficient level in Composition. Student's IEP progress reports for the 2012-2013 school year indicated that he was progressing, but had not mastered any of his IEP goals. His final grades in core courses for the 2012-2013 school year were World History/Geography - D, Science - C, Pre-Algebra - C-, Spanish - D and English - B. Exhibits R-15, P-32.

18. On May 13, 2013, Petitioner wrote LEA Rep to request that an IEP team meeting for Student be held as soon as possible to address her concerns that Student's educational needs were not being met by his current IEP and to evaluate steps to resolve this. The letter was copied by email to the special education coordinator. Exhibit P-15. The requested IEP meeting was not convened. Testimony of Mentor.

19. In June 2013, at the end of the 2012-2013 school year, Petitioner retained Petitioner's Counsel and her law firm to represent her in dealing with DCPS and School D regarding Student's special education needs. Testimony of Paralegal.

20. On July 1, 2013, Petitioner, by Petitioner's Counsel, filed a prior due process complaint on behalf of Student (Case No. 2013-0372). At the resolution meeting in that case, DCPS agreed to fund an Independent Educational Evaluation (IEE) Comprehensive Psychological Evaluation of Student. There was no settlement agreement. By an Order of Withdrawal issued July 30, 2014, the hearing officer in Case No. 2013-0372 granted Petitioner's request to withdraw her due process complaint

without prejudice. Clinical Psychologist was engaged to conduct the IEE psychological evaluation of Student. Exhibits R-14, P-41.

21. In August 2013, Clinical Psychologist and a Psychology Resident supervised by Clinical Psychologist, conducted the IEE Comprehensive Psychological Evaluation of Student. In her October 3, 2013 report, Clinical Psychologist reported that Student's cognitive scores were Average to High Average. His academic achievement scores were Average for Broad Reading and Broad Written Language and Low Average for Broad Math. Endorsements from Student's teachers on the Behavioral Assessment Scale for Children (BASC-2) led to no behaviors that were in the Clinically Significant range, but Student was in the At-Risk range for attention in the classroom and study skills. The teachers' ADHD rating scales were in the normal range, but Petitioner's ADHD rating scale was in the clinically significant range. Clinical Psychologist diagnosed Student with Mood Disorder Not Otherwise Specified and ADHD - Combined type, based on history and Petitioner's rating scales. Clinical Psychologist recommended that Student should continue to be classified as a Student with an ED disability. The independent evaluation recommended that Student's IEP should provide for 15 hours per week of special education supports outside the general education setting and inclusion support in Student's other classes. Clinical Psychologist also recommended that Student be provided 30 minutes per week of counseling. Exhibit P-41.

22. SCHOOL D SCHOOL PSYCHOLOGIST conducted a review of Student's records and prior evaluations in September 2013. She also conducted an observation of Student in his general education English/Language classroom and interviewed two teachers and School Social Worker. On September 18, 2013, School D School

Psychologist reported that although Student's social worker reported he had made improvement in the 2012-2013 school year, he did have one significant incident of school refusal. His 2012-2013 school year teachers reported a lack of motivation for doing school work. School D School Psychologist reported that Student demonstrated distracted behavior in the classroom observation. She reported that Student's lack of motivation, school absences and distracted behavior in the classroom were all behaviors that made it difficult for him to access the general education curriculum. School D School Psychologist reported that Student continued to meet criteria for the ED disability classification. Exhibit R-15.

23. In a September 18, 2013 School D Evaluation Summary Report, it was reported that Student's behavior impacted his academic progress, that Student seldom returned homework, completed warm ups, or class work and refused to work in a small group or with a peer in a group activity. It was also reported that Student could be a cooperative and hardworking student and that when in a pleasant mood, he had the ability to work well with peers and staff. Exhibit R-16.

24. On November 13, 2013, Student's IEP team was convened for an annual IEP review at School D. Petitioner, Student's Mother and Paralegal attended the meeting. The school principal stated that to her knowledge, Student had no behavior issues at school but he did not report to school on time. Student's special education teacher reported that she provided accommodations to Student, such as extended time, short assignments and encouragement, but that he often slept in class. His English-Language Arts teacher reported that Student showed a lack of interest and she had difficulty with him staying focused. She reported that he had a current grade of F due to not turning in assignments. Student's math teacher said his academic performance had

been low and his attendance was poor. She stated he would bother other students in class and it usually took 3-4 attempts to redirect him. School Social Worker stated that Student was more distracted at school and that he had said that his family issues were weighing on him. She stated that Student's issues had to do with family dynamics and that he did not want to come to school because he wanted to know that his mother was OK. Social Worker said this was interfering with his academics. Exhibits P-17, R-17.

The IEP team was presented with a draft IEP which reduced Student's Special Education Services to seven hours per week, all in the general education setting. The draft IEP provided that Student's Behavioral Support Services would be maintained at 120 minutes per month. The IEP was not completed at the November 13, 2013 meeting. Exhibit P-16.

25. At the November 13, 2013 IEP meeting, Paralegal requested school staff to conduct an updated FBA and to develop a BIP. Exhibit P-21.

26. School D School Psychologist reviewed Clinical Psychologist's October 3, 2013 IEE psychological evaluation of Student and conducted classroom observations. She reported in her December 11, 2013 Review of Independent Educational Evaluation, that she observed Student in his mathematics classroom on November 25, 2013. Student had his jacket covering his head for most of the observation and School D School Psychologist reported that inattention was the main problem observed. School D School Psychologist also observed Student in science class on November 27, 2013. She reported that Student was engaged in that class. Exhibit R-1.

27. In her December 11, 2013 report, School D School Psychologist reported that Student's current school year PIA scores showed inconsistent performance, that was below and above the class average in reading and math. His IEP progress reports

for the 2013-2014 school year indicated that he was progressing but had not mastered any IEP goals. School D School Psychologist reported that Student's anxiety about family dynamics, lack of class participation and difficulty relating to peers made it difficult for him to access the general education curriculum. She stated that Student continued to meet criteria for the ED disability classification. Exhibit R-17.

28. Student's IEP team reconvened on December 11, 2013 for the IEP annual review. Petitioner, Mentor and Paralegal attended the IEP meeting. Paralegal stated her disagreement with the use of Common Core standards in the IEP and her concern that there was only one annual goal for the IEP mathematics area of concern. The IEP team agreed that an FBA would be conducted and a BIP developed. Student's Specialized Instruction Services were increased to 10 hours per week, all in the general education setting. His Behavioral Support Services were continued at 120 minutes per month. Exhibits P-20, P-21.

29. CASE MANAGER conducted an updated FBA of Student in January 2014. She reported that Student's behaviors of concern were moodiness, social skills, truancy, late assignments, noncompliance, being off task, withdrawal and poor motivation; that the behaviors occurred 3-4 times per week in all settings, especially in Spanish class. She described the function of Student's behaviors as being to avoid educational tasks and interactions with others, to avoid communicating his feelings, to gain control over his environment and to gain attention from staff. Exhibit P-42.

30. Licensed Psychologist conducted an independent FBA of Student in spring 2014. She conducted multiple classroom observations in April and May 2014. In her May 12, 2014 report, Licensed Psychologist reported that Student's behaviors of concern were inattention, distractibility, lethargy, aggression when redirected, slowness to start

class work, not being prepared with class materials, impulsivity, ignoring teachers, tardiness, failing to follow teacher prompts, being off task, talking to peers, not following the lessons, and failure to complete assignments. She attributed his behaviors to his diagnoses of ADHD and Mood Disorder and recommended that a BIP be developed for Student, which would incorporate desired rewards for Student, daily progress report sheets, class breaks, non-verbal prompts and frequent feedback and consequences. Exhibit P-44.

31. An IEP meeting was convened on June 4 and June 9, 2014 at School D to develop a revised BIP for Student and to revise his IEP. Paralegal attended the meeting and Petitioner participated by telephone. In the June 9, 2014 revised IEP, Student's Specialized Instruction Services were increased to 20 hours per week, all outside general education. His Behavioral Support Services were continued at 120 minutes per month. Student's matriculation to City High School was discussed at the June 2014 IEP meeting. There was discussion about the ED program at City High School at the June 4, 2014 IEP meeting. Exhibits P-26, P-27, P-30.

32. The June 9, 2014 BIP included social skills development via cognitive behavior therapy, "free time" rewards to reinforce appropriate school behavior and improved attendance, and withholding of non-academic activities and outings as consequences for poor behavior and poor attendance. Exhibit R-19.

33. On June 9, 2014, DCPS issued a Prior Written Notice that Student's IEP would be amended to increase specialized instruction hours, to change the setting to outside of general education and to add goals for social emotional skills. The stated reason for the change was that Student was making little progress in the regular education setting. Exhibit R-20.

34. Student's final grades for the 2013-2014 school year were English C-, History/Geography C-, Science D+, Spanish D, Pre-Algebra D, Music D, Art A, School Support B and Health/Physical Education B. In his core courses for the school year, Student had 43 absences in English, 40 absences in History/Geography, 37 absences in Science, 21 absences in Spanish and 39 absences in Pre-Algebra. Exhibit R-21.

35. Student matriculated to City High School for the 2014-2015 school year. The weekend before school started, Mentor took Student to the school by bus for a "dry run." Student would not enter the building. He told Mentor that "It's huge." Mentor thought Student was "absolutely terrified" of the school. Testimony of Mentor.

36. Student did not attend school at all for the beginning of the 2014-2015 school year. On October 14, 2014, an IEP team meeting was convened at City High School to discuss Student's nonattendance. The Guardian attended the meeting by telephone and Petitioner's Counsel, Paralegal and Mentor attended in person. Petitioner's Counsel stated Student was not attending City High School due to "school phobia" and requested that Student's placement be changed to a full-time placement in a small setting. DCPS offered to provide Student private transportation and independent counseling to assist him with the school transition. The school representatives stated that at City High School, student would be placed in the self-contained Behavior Education Support (BES) classroom, which is full-time for 20 hours per week. COMPLIANCE CASE MANAGER stated that the 20 hours was for academics. Exhibit P-53. DCPS did not agree to change Student's IEP at the meeting. Exhibits R-25, R-26.

37. When DCPS threatened to involve DC Child Protective Services in Student's truancy issues, Student was prevailed upon to go to school. Testimony of

Mentor. His attended for the first time this school year on October 21, 2014. Testimony of City High School School Psychologist. Since then, Student's school attendance has been sporadic. Testimony of Mentor.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and the argument and legal memoranda 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, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

A.

Fall 2012 IEPs

- Did DCPS deny Student FAPE by providing him with inappropriate IEPs in September 2012 and November of 2012, because those IEPs provided insufficient hours of Specialized Instruction, the annual goals and present levels of performance were not based upon current data, and the IEPs lacked adequate classroom and testing accommodations?
- Did DCPS deny Student a FAPE by failing to properly invite the Guardian to the November 14, 2012 meeting and holding the meeting without making appropriate efforts to include her?

Student transferred to School D at the beginning of the 2012-2013 school year. Under his prior October 13, 2011 IEP developed at School C, Student was provided full-time, 31 hours per week, Specialized Instruction, outside the general education setting, and one hour per week of Behavioral Support Services. On September 14, 2012, three

weeks into the new school year, an IEP team meeting was convened at School D to review Student's IEP. At that meeting, school staff stated that School D did not have the resources to implement Student's full-time School C IEP. The IEP team decided to reduce Student's Specialized Instruction Services from full-time to fifteen hours per week, of which seven hours would be in the general education setting. Student's Behavioral Support Services were continued at 240 minutes per month.

On November 14, 2012, the School D IEP team convened again for an annual IEP review and Student's services were reduced further. At that meeting, Student's Specialized Instruction Services were reduced to eight hours per week, of which only one hour would be outside general education. The IEP team also reduced Student's Behavioral Support Services by one-half to 120 minutes per month. Petitioner contends that Student was denied a FAPE as a result of the revisions to his IEP in September and November 2012. DCPS responds that the IEP service reductions were warranted by Student's progress in his last months at School C and after enrolling at School D.

The question of whether an IEP is appropriate "rests on '(1) whether DCPS has complied with the 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)). Petitioner alleges both procedural and substantive violations by DCPS.

Substantive Appropriateness of the Fall 2012 IEPs

Petitioner contends that the fall 2012 IEPs were deficient both procedurally and substantively and were based upon the resources available at School D, rather than on Student's needs. I agree. The IDEA, of course, contemplates periodic revisions to a

student's IEP. The Act requires that a student's IEP team reviews the IEP periodically, but not less than annually, to determine whether the annual goals for the student 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).

However, it is fundamental to the IEP revision process that when the IEP team reviews the IEP, the team must consider, “the academic, developmental, and functional needs of the child,” including “the results of the . . . most recent evaluation of the child.” 20 U.S.C. § 1414(d)(3). In this case, it is evident from the face of both the September 14, 2012 and November 14, 2012 IEPs that the reductions in services to Student were not supported by his needs, as identified in the IEPs, or by his most recent evaluations.

Every IEP must include a written statement for the student “that is developed, reviewed, and revised” at the IEP team meeting, which must include—

(1) A statement of the child's present levels of academic achievement and functional performance, including—

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (*i.e.*, the same curriculum as for nondisabled children); . . .

(2)(i) 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). With a few exceptions, the statements of academic Present Levels of Educational Performance, Needs, and Baselines in both the September 14 2012 and November 14, 2012 IEPs, as well as some IEP annual goals, were carried over verbatim from Student's October 13, 2011 School C IEP. For example, the Present Level of Educational Performance for Written Expression and Needs are identical in each of the October 12, 2010, September 12, 2012 and November 14, 2012 IEPs: "[Student's] handwriting is awesome. It is legible; letters are in correct form and seated on the line. He can write sentences to form a paragraph. He can copy words, phrases and sentences from the board. He can write simple sentences independently. . . . [Student] needs to work on being mindful of capitalization and punctuation rules. He also needs to master the correct subject-verb agreement and correct tenses of the verb. He needs to strengthen the parts of speech (eg. adverb, adjective, conjunction, and preposition)." [*sic*]. The Emotional, Social and Behavioral Development Area of Concern in the October 13, 2011 IEP was likewise repeated, verbatim, in the September 12, 2012 and November 14, 2012 IEPs – except to extend the Anticipated Dates of Achievement 12 months further out.

An IEP is not necessarily inappropriate simply because it repeats Present Levels of Performance and Annual Goals from a prior year IEP. Not every student progresses as anticipated. However, if the Present Levels and Annual Goals must be repeated, the IEP team is required to address the lack of progress in the revised IEP. *See Schroll v.*

Bd. of Educ. Champaign Cmty. Unit. Sch. Dist. # 4, No. 06–2200, 2007 WL 2681207, at 4–5, 2007 (C.D.Ill. Aug. 10, 2007) (“An IEP is not inappropriate simply because it does not change significantly on an annual basis[, but] . . . if the student made no progress under a particular IEP in a particular year, . . . the propriety of an identical IEP in the next year may be questionable.”) *See, also, 34 CFR § 300.324(b)* (Child’s IEP team must review IEP periodically to determine whether the annual goals for the child are being achieved.)

In the September 14, 2012 and November 14, 2012 IEPs, Student’s IEP team left his Present Levels of Performance, Needs and Baselines unchanged from his prior year October 13, 2011 IEP, indicating that Student had made no progress. Notwithstanding, the IEP team decided to reduce Student’s Specialized Instruction Services and Behavioral Support Services dramatically. In the November 14, 2012 IEP, the team reduced Student’s Specialized Instruction Services from his 2011 IEP by more than two-thirds (from 30 hours to 8 hours per week), cut Behavioral Support Services in half and changed Student’s placement from full-time outside of general education to almost full-time inclusion. The School D fall 2012 IEP revisions were clearly not based upon Student’s “anticipated needs” as stated in the IEPs. *See 34 CFR § 300.324(b)(ii)(D)*.

Neither were the reductions in services in the fall 2012 IEPs based upon the results of Student’s most recent evaluations. *See 34 CFR § 300.324(a)(iii)*. When Student enrolled in School D in the fall of 2012, his most recent psychological evaluation, conducted by DCPS in May 2010, reported that behavioral measures placed Student’s functioning in the significant range in almost all domains and that Student appeared to be a deeply troubled and unhappy child in need of substantial support and intervention. His then-current functioning prevented him from independently

accessing the curriculum. In the May 28, 2010 Comprehensive Psychological report, the DCPS school psychologists “strongly recommended” that Student be provided a 1:1 aide even when placed in a therapeutic setting, until such time as he become more stable.

Social Worker testified that in Student’s first year at School D, school staff did not witness the behavioral concerns identified in the May 28, 2010 psychological evaluation. However, if DCPS considered in the fall of 2012 that Student’s May 2010 psychological evaluation was out-of-date, it was required to obtain a reevaluation as part of Student’s IEP review process. *See* 34 CFR § 300.303(a)(1) (a public agency must ensure that a reevaluation of each child with a disability is conducted if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation); *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46644. (one of the purposes of a reevaluation is to determine the educational needs of the child, including whether any additions or modifications to the special education and related services are needed to enable the child to meet the child’s IEP goals and to participate in the general education curriculum.)

Although DCPS failed to have Student reevaluated before the fall 2012 IEP meetings, DCPS’ Counsel argues on brief that the IEP services reductions were appropriate, because, at the end of the preceding 2011-2012 school year at School C, Student had scored at the basic level in math and reading on the DC CAS, he had mastered many of his academic IEP goals and he had shown marked progress in his emotional, social and behavioral development. If that were so, Student’s supposed progress should have been reflected in the Present Levels of Educational Performance or the Annual Goals in the fall 2012 IEPs – which were, in fact, not updated from the 2011

IEP. The measure and adequacy of an IEP can only be 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). School D's modifications to Student's IEPs in the fall of 2012 were not based upon any progress reported in the respective September 14, 2012 and November 14, 2012 IEPs or upon updated reevaluations. I conclude that when the School D IEPs were offered to Student in fall 2012, the IEPs were not "reasonably calculated to confer educational benefits" on Student. *See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Student was denied a FAPE as a result.

Petitioner also alleges, as an IEP procedural violation, that School D held the November 14, 2012 IEP meeting without making sufficient effort to ensure that the Guardian could attend. For all IEP team meetings, the IDEA expressly requires that the local education agency (LEA) take steps to ensure that the parent is present or is afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

34 CFR § 300.322(a). However, an IEP meeting may be held without the parent present if the public agency is unable to convince the parent to attend and if the agency kept a record of its attempts to arrange and agree on a mutually convenient time and place. *See Jalloh v. District of Columbia*, 968 F.Supp.2d 203, 211 (D.D.C.2013).

For the November 14, 2014 IEP meeting, the Guardian had notice of the meeting. The Guardian contacted Mentor two days before the scheduled meeting date and asked her to attend the meeting in the parent's place. DCPS consented to this request,

provided that the Guardian was present at the beginning of the meeting by telephone. On the day of the meeting, the Guardian, by telephone, authorized DCPS to proceed with the meeting without her being present. Mentor attended the entire meeting as Petitioner's representative.

I find that, through the representation of Mentor, Petitioner had the opportunity to meaningfully participate in developing Student's November 14, 2012 IEP. Mentor was knowledgeable about Student's needs, having been closely involved in his education since March 2012. Tutor had personally taken Student's education records to School D and had accompanied Student to Back-to-School night in August 2012, where she met School D LEA Rep. Because the Guardian authorized the School D IEP team to hold the November 14, 2012 IEP meeting without her, but with Mentor's participating as the parent's representative, School D did not violate the IDEA by proceeding with the IEP meeting without the Guardian in attendance.

B.

Did DCPS deny Student a FAPE by failing to conduct psychological and FBA re-evaluations of the student, timely following the Guardian's February 1, 2013 request for such evaluations?

On February 1, 2013, the Guardian faxed a written request to the School D LEA Rep for a comprehensive reevaluation of Student, including a comprehensive psychological evaluation, an FBA, and a Social History. She stated that the request was made because the information used to build Student's November 14, 2012 IEP did not accurately reflect his current needs. Initially, the school did not respond to the reevaluation request. After several follow-up requests, the school finally responded on May 8, 2013 that it would start the reevaluation process in September 2013. After Petitioner filed a due process complaint in summer 2013 (later withdrawn), DCPS

agreed to fund an independent psychological evaluation of Student. The requested FBA was not conducted by DCPS until January 2014.

The IDEA provides that a reevaluation may occur not more than once a year and must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. As stated in § 300.303, consistent with section 614(a)(2) of the IDEA, a parent can request a reevaluation at any time. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46641. The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student's parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, the Court in *Herbin* concluded that "[r]evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting Office of Special Education Programs, *Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995)). *See, also, Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010). Here, DCPS delayed over six months after receipt of the Guardian's request before having Student reevaluated (by funding the IEE evaluation) and 11 months in conducting the requested FBA. I find that these were clearly undue delays.

A failure to timely reevaluate is a procedural violation of IDEA. *See Smith, supra.* 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, when Student's IEP team reviewed Student's independent psychological evaluation at a

meeting on December 11, 2013, the IEP team agreed to increase Student's Specialized Instruction Services 25 percent, from eight hours per week to 10 hours per week. Had DCPS responded to the Guardian's February 1, 2012 reevaluation request in a reasonable period of time, the reevaluation should have been completed, and Student's IEP revised, at latest by the beginning of the 2013-2014 school year. I conclude, therefore, that DCPS' delay in providing the reevaluations requested by the Guardian resulted in a loss of educational opportunity to Student. *See, e.g., D.R. ex rel. Robinson v. Gov't of D.C.*, 637 F.Supp.2d 11, 18–19 (D.D.C.2009) (finding that the defendant's delay affected the student's substantive rights because the student's most recent IEP differed from the one previously issued). Student has been denied a FAPE as a result.

C.

Did DCPS deny Student a FAPE by failing to provide him an appropriate IEP at the December 2013 IEP meeting because that IEP lacked sufficient hours of Specialized Instruction, including Specialized Instruction outside of general education, the annual goals were not individualized to Student's levels and needs, and the IEP lacked a BIP?

The School D IEP team convened on December 11, 2013 for Student's annual IEP review. Mother, Paralegal and Mentor attended the meeting. The IEP team reviewed the IEE psychological evaluation of student completed in October 2013, Student's IEP progress reports, a "Psychological Triennial Reevaluation"³ completed by School D Psychologist in September 2013 and other data. For the first term of the 2013-2014 school year, Student had passed all of his courses, including with Ds received in Spanish and Pre-Algebra. The IEP team decided to increase Student's Specialized Instruction

³ This report was not a true reevaluation. Rather it was a review of previous psychological and educational assessments, and Student's more recent standardized test scores, IEP progress reports and report cards. School D Psychologist also reported on her classroom observations of Student and interviews with Student's teachers and School Social Worker. See Exhibit P-40.

Services from eight hours per week to ten hours per week, all in the general education setting. The team did not increase Students Behavioral Support Services or provide additional behavioral interventions.

In her expert testimony, Educational Advocate opined that the December 11, 2013 IEP was inadequate because the IEP annual goals were insufficient and the IEP did not address Student's behavioral needs. With regard to annual goals, the IDEA requires that IEP annual goals must be designed to enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability. *See* 34 CFR § 300.320(a)(2). Educational Advocate opined, summarily, that the annual goals were inadequate because there were only one or two goals for each area of concern and the goals did not relate back to Student's present levels of performance. I found that the opinion of Educational Advocate on the appropriateness of the annual goals in the December 11, 2013 IEP was unpersuasive, because her testimony was not sufficiently comprehensive to establish that the annual goals were not adequate to meet the IDEA's requirements.

Petitioner adduced no evidence at the due process hearing that the increase of Specialized Instruction Services to 10 hours per week in the December 11, 2013 IEP was not sufficient to meet the Supreme Court's "basic floor of opportunity" standard. *See A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (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." *Id.* (quoting *Rowley, supra*, 458 U.S. at 201.)) Unlike the School D IEPs from fall 2012, the December 11, 2013 IEP included

updated Present Levels of Performance and Annual Goals and the IEP team had data from Student's first year and one-half as a Student at School D to inform its considerations. I find that Petitioner has not shown that the Specialized Instruction Services in this IEP were not reasonably calculated to enable Student to receive educational benefits.

I agree with the Petitioner that the December 11, 2013 IEP failed to address adequately Student's behavioral needs. The IEP team reported that Student's behavior impeded his learning, and, specifically, that he was inattentive and unresponsive and that he often did not complete class or homework assignments. At an earlier IEP team meeting on November 13, 2013, Student was reported to be missing school and disengaged in his classes. The IDEA requires 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). Student's last behavior intervention plan (BIP) had been developed in January 2010, when he had a full-time IEP at School A. The December 11, 2013 IEP team was therefore required to consider revising Student's BIP or the use of other strategies to address Student's behavior issues. However, the IEP team only continued the prior year IEP's provision for 120 minutes per month of Behavioral Support Services and did not provide other behavioral strategies. I find, therefore, that Petitioner has established that with respect to behavioral interventions, the December 11, 2013 IEP was not reasonably calculated provide Student educational benefits.

D.

Did DCPS deny Student a FAPE by failing to provide him an appropriate IEP when it revised his IEP on June 9, 2014 because that IEP lacked a BIP, provided insufficient hours of Specialized Instruction, including Specialized Instruction

outside of general education, and the annual goals were not individualized to Student's levels and needs and did not correspond to his present levels baselines?

On June 9, 2014, the School D IEP team substantially revised Student's IEP. In the new IEP, Student's Specialized Instruction Services were increased from ten hours per week in the regular classroom to 20 hours per week, all outside general education. The IEP team also revised Student's annual goal in the Emotional, Social and Behavioral Development area of concern to include Student's attending school on a regular basis. Petitioner offered no evidence at the due process hearing that the annual goals in the June 9, 2014 IEP were not adequate to enable Student to make progress in the general education curriculum and to meet his other educational needs. *See* 34 CFR § 300.320(a)(2). On June 9, 2014, School D also developed new BIP for Student. The fact that this BIP was not incorporated into the IEP has no significance. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006) (IDEA does not require that a BIP be incorporated into a child's IEP.) Most significantly, Petitioner offered no probative evidence that the increase in Student's Specialized Instruction Services in the June 9, 2014 IEP, to 20 hours per week outside general education, did not offer the "basic floor of opportunity" to Student required by the IDEA. *See Rowley, supra*. I find, therefore, that Petitioner did not meet her burden of proof to establish that the June 9, 2014 IEP was not reasonably calculated to provide Student educational benefits.

E.

Did DCPS deny Student a FAPE by failing to include the Guardian and the IEP team in the decision of the specific kind of educational program/placement that the student would be placed in (the BES program) at City High School for the 2014-2015 school year?

Did DCPS fail to provide Student with an educational placement/school for the

2014-2015 school year that could implement the IEP as written and provide instead a more restrictive setting than identified the current IEP?

Student's June 9, 2014 IEP provided that he would receive 20 hours per week of Specialized Instruction services in an outside of general education setting. For the 2014-2015 school year, DCPS assigned Student to the self-contained BES classroom at City High School. Petitioner contends that DCPS violated IDEA by selecting this location without input from the Guardian or Student's IEP team, and that in the BES program, Student's IEP cannot be implemented as written. DCPS maintains that the City High School BES Program can implement Student's IEP and that the program was discussed as a possibility for Student at a June 4, 2014 IEP meeting.

The IDEA requires that the educational placement made by an LEA be "reasonably calculated to enable the child to receive educational benefits," that is, "sufficient to confer some educational benefit upon the handicapped child." *See Dawkins by Dawkins v. District of Columbia*, 1989 WL 40280, 3 (D.C.Cir. Apr. 24,1989), quoting *Rowley, supra*, 458 U.S. at 200, 207. A placement is appropriate if the school is capable of "substantially implementing" the IEP. *Johnson v. District of Columbia*, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (citing *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000)). *See, also, Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991) (DCPS' obligation to match student with a school capable of fulfilling IEP needs.)

The Act also requires parental involvement regarding any decisions "on the educational placement of their child." *See Aikens v. District of Columbia*, 950 F.Supp.2d 186, 190 (D.D.C. 2013), citing 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(a)(1), 300.327. However, it is unsettled in this jurisdiction whether DCPS' often unilateral site

selection process comports with the requirements of the IDEA for parental involvement in placement decisions. *See, e.g., Aikens, supra* at 191 (“[E]ducational placement refers to ‘the classes, individualized attention and additional services a child will receive — rather than the ‘bricks and mortar’ of the specific school.’” *Id., citing T.Y. v. N.Y.C. Dep’t of Educ.*, 584 F.3d 412, 419 (2d Cir.2009); *James v. District of Columbia*, 949 F.Supp.2d 1343 (D.D.C.2013) (“While the IDEA requires a student’s parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not explicitly require parental participation in site selection.” *Id.* at 138, citation and internal quotation omitted); *Copeland v. District of Columbia*, 2014 WL 4520213, 6 (D.D.C.) (D.D.C. Sept. 15, 2014). *But see Eley v. District of Columbia*, 2014 WL 2507937, 11 (D.D.C. Jun. 4, 2014) (Location where educational services are to be implemented is a vital portion of a student’s educational placement.)

It is unnecessary to decide here whether in the District, parents must participate in the location of services decision because in this case, the Guardian was involved in the City High School site selection process. Student’s matriculation to City High School was discussed at the June 4, 2014 and the June 9, 2014 IEP meetings. There was discussion about the ED program at City High School at the June 4, 2014 IEP meeting. I find, therefore, that the parent was involved in the IEP team decision to place Student at City High School.

I also find that the Guardian did not meet her burden of proof that City High School is not capable of substantially implementing the requirements of the June 9, 2014 IEP for Student receive 20 hours per week of Specialized Instruction in an outside of general education setting. While little evidence on the program at City High School was offered by either party at the due process hearing, the City High School principal

represented at an October 14, 2014 IEP team meeting that Student would be assigned to the BES program, which is full-time for 20 hours per week. Compliance Case Manager stated that the 20 hours was for academics.

F.

Did DCPS deny Student a FAPE following the start of the 2014-2015 school year by failing to take appropriate steps to address Student's lack of attendance at school?

Did DCPS deny Student a FAPE at a meeting held on October 14, 2014 by not taking into account new data provided by the IEP team regarding Student's school phobia/ anxiety/ depression in his educational programming/ placement, by refusing to increase the student's hours of specialized instruction outside of the general education setting, by keeping Student in the BES program, a more restrictive program than what the IEP requires; and by failing to ensure that all required members of the IEP team attended the meeting?

Did DCPS deny Student a FAPE by failing to provide him with an appropriate therapeutic, small, and structured educational program for the 2014-2015 school year?

All of Petitioner's remaining claims concern Student's truancy and attendance problems in the current 2014-2015 school year. When Mentor took Student on a trial run visit to City High School the weekend before school started, Student refused to enter the building. Mentor believed Student was "absolutely terrified" by the "huge" school. From the beginning of the school year through October 21, 2014, Student did not attend school at all. At a multidisciplinary team (MDT) meeting at City High School on October 14, 2014, Petitioner's Counsel asserted that Student had emotional issues that prevented him from going to school. The DCPS representatives offered to conduct assessments of Student at his home and also, to facilitate Student's school reentry, to arrange private transportation and a personal mentor to go to Student's home in the mornings. Student was finally prevailed upon to go to school on October 21, 2014. Since then, Student's attendance at school has been sporadic.

Petitioner asserts that DCPS denied Student a FAPE by not addressing his non-attendance before the October 14, 2014 MDT team meeting. I agree. Congress recognized in the IDEA that “social and emotional problems are not *ipso facto* separable from the learning process.” *Indept. School Dist. No. 284 v. A.C.*, 258 F.3d 769, 776–77 (8th Cir.2001). As noted above in this decision, 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); *Harris v. District of Columbia*, 561 F.Supp.2d 63 (D.D.C.2008). In *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F.Supp.2d 18 (D.Me.2005), the court considered a case of a student who had an “extensively documented” array of difficulties, particularly problems with attendance. The Court held that the local education agency’s IEP, which failed to address in some fashion the student’s persistent absence and tardiness, could not be “adequate and appropriate.” *Id.* at 34. See, also, *Lauren P. ex rel. David P. v. Wissahickon School Dist.*, 2007 WL 1810671, 7 (E.D.Pa.2007), rev’d in part on other grounds, 310 Fed.Appx. 552, 2009 WL 382529 (3rd Cir. 2009) (LEA’s inconsistency of approach to Student’s behavioral problems, including lateness, absences, and failure to complete assignments, resulted in denial of FAPE.)

In the instant case, Student failed to attend school for some eight weeks at the beginning of the school year. DCPS did not intervene, even though at the June 9, 2014 IEP meeting, the IEP team had added a new IEP behavioral goal for Student to attend school on a regular basis. DCPS’ failure to address Student’s truancy at the beginning of the current school year violated the IDEA and denied Student a FAPE.

When DCPS finally convened an IEP team meeting on October 14, 2014, it agreed

to take several steps to address Student's non-attendance. These steps included conducting an updated psychological assessment and arranging private transportation and mentoring to facilitate Student's reentry to school. Petitioner contends that in response to Student's not attending school, DCPS should have increased Student's hours of specialized instruction outside of the general education setting. However, the June 9, 2014 IEP increased Student's Specialized Instruction hours from 10 hours to 20 hours per week and changed his placement to outside of general education. It would have been inappropriate for DCPS to increase Student's hours of specialized instruction again, before an attempt had been made to implement the June 9, 2014 revised IEP and before Student had been reevaluated. *See* 34 CFR § 300.324(a)(iii) (IEP team must consider results of most recent evaluations.) I find that the interventions proposed by DCPS at the October 14, 2014 meeting, albeit belated, were an adequate response and appropriate to address Student's nonattendance. *See Lamoine School Committee, supra.*

Petitioner also complains that not all required members of Student's IEP team attended the October 14, 2014 IEP meeting, apparently because there was no regular education teacher at the meeting, *see* 34 CFR § 300.321(a), or because some school representatives left the meeting early. *See Exhibit P-53.* Even if not all required IEP team members attended all of the October 14, 2014 meeting, Petitioner has not shown any harm that resulted. *See, e.g., Fitzgerald v. Fairfax County School Bd.*, 556 F.Supp.2d 543, 557 (E.D.Va.2008) (IEP team membership issue is procedural claim.) Petitioner is not entitled to relief for this alleged procedural violation.

Lastly, Petitioner claims that DCPS denied Student a FAPE by not providing him a "therapeutic, small, and structured educational program" for the 2014-2015 school

year. At the due process hearing, Clinical Psychologist opined that Student required this more restrictive program based upon her opinion that he evidenced several symptoms of Social Anxiety Disorder. I did not find Clinical Psychologist's opinion to be credible. Her expert report was drafted one week before the due process hearing and had not been previously provided to DCPS. But in her two prior assessments of Student (the October 2013 comprehensive psychological and the May 2014 FBA), Clinical Psychologist had not diagnosed Student with a Social Anxiety Disorder. To arrive at her new opinion, Clinical Psychologist only interviewed Student for 30 minutes. She did not conduct a formal psychological reassessment and she was not able to observe Student at school.

City High School School Psychologist dismissed the Social Anxiety Disorder diagnosis. She noted that the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) criteria for that condition include that it must be persistent, typically lasting 6 or more months, and that here, Student was not reported to have exhibited the disorder until he transferred to City High School at the beginning of the current school year. Moreover, City High School School Psychologist saw Student several times after he started going to school on October 21, 2014. To her, Student seemed relaxed at school and did not show signs of anxiety. I conclude that Petitioner has not met her burden of proof to establish that Student's least restrictive environment is a therapeutic, small, and structured educational program, more restrictive than the BES program at City High School.

Remedy

In this decision, I have found that since the fall of 2012, DCPS has repeatedly failed to provide Student a FAPE. These failings include:

1. Reducing Student's Specialized Instruction and changing his placement to a less restrictive environment in the September 14, 2012 IEP;
2. Further reducing Student's Specialized Instruction Services in his November 14, 2012 IEP;
3. Repeating and not updating Student's Present Levels of Performance and Annual Goals in the September 14, 2012 and November 14, 2012 IEPs;
4. Failure to timely conduct psychological and FBA re-evaluations of Student upon the request of the Guardian on February 1, 2014;
5. Failure to provide appropriate behavioral interventions in the December 11, 2013; and
6. Failing to address Student nonattendance at City High School for the first eight weeks of the 2014-2015 school year.

For her remedy in this case, Petitioner requests that DCPS be order to fund Student's prospective placement at Nonpublic School and that Student be awarded compensatory education.

Prospective Private School Funding

"If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school, *see School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985) (" Town of Burlington "); however, if there is an "appropriate" public school program available, *i.e.*, one "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child," *see Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 86

(D.C.Cir.1991) (quoting *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).” *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991).

In this decision, I have determined that although parts of the school year 2012-2014 and 2013-2014 School D IEPs were not appropriate for Student, Petitioner did not carry her burden of proof to establish that the most recent, June 9, 2014, IEP offered by DCPS was not reasonably calculated to provide educational benefits to Student or that Student’s placement in the BES program at City High School was not “appropriate.” Therefore, Petitioner has not shown that for the 2014-2015 school year, DCPS has failed to offer Student an appropriate IEP or that there is no suitable public school to implement the IEP. Accordingly, Petitioner’s request that DCPS be ordered to pay for Student to attend Nonpublic School must be denied.

Compensatory Education

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 student might have shown if he had received the required special education services, and the type and amount of services that would place the student in the same position he 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*, 401 F.3d 516 (D.C.Cir. 2005)). The burden of proof is on the Petitioner to produce sufficient evidence demonstrating the type and quantum of compensatory

education that is appropriate. *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012). Notwithstanding, a student is not required “to have a perfect case to be entitled to compensatory education.” *See Cousins, supra* at 148 (citations omitted.)

Petitioner has submitted a compensatory education plan for Student (Exhibit P-1), drafted by Educational Advocate. Educational Advocate proposes that Student be provide 300 hours of tutoring in mathematics, reading and written language for DCPS’ violations of the IDEA alleged in the complaint – subject to a reduction for the alleged denials of FAPE which were not proven. In this decision, I have found that Student’s September 14, 2012 and November 14, 2012 were not reasonably calculated to provide educational benefits, but that the Petitioner did not prove that the Specialized Instruction Services in Student’s subsequent IEPs, beginning with the December 11, 2013 IEP were inappropriate. I also found that DCPS denied Student a FAPE by not timely conducting the psychological and FBA reassessments requested by the Guardian in February 2013.

I found Educational Advocate to be a credible witness with regard to her compensatory education proposal. Student attended School D for two school years. For the first year and one-half, DCPS failed to ensure that Student’s IEP provided appropriate special education and related services. I find that an appropriate compensatory education remedy for DCPS’ violations of the IDEA while Student attended School D would be 300 hours of academic tutoring, reduced by 25 percent for the period after the December 11, 2013 IEP was developed. Therefore, I will order DCPS to provide Student 225 hours of academic tutoring as compensatory education for its denials of FAPE to Student when he was enrolled at School D. Due to the extended duration of these denials of FAPE, Student will be allowed to use the tutoring services

through the end of the next school year.

Educational Advocate recommends an additional compensatory education award for the alleged denials of FAPE in the 2014-2015 school year. The only denial of FAPE which I have found for this period was the failure of DCPS to address Student's nonattendance for the first eight weeks of the school year. Educational Advocate recommends that I order DCPS to provide compensatory education in the form of two hours of credit recovery, supplemented by 80 hours of tutoring to facilitate the credit recovery classes. I concur with Educational Advocate's recommendation for the provision of credit recovery classes as appropriate compensatory education. However, the request for additional tutoring to facilitate the credit recovery classes is not warranted. By all accounts, Student has scored Low Average to High Average on academic achievement tests. The evidence does not show that he would require supplemental tutoring to complete credit recovery classes.

Additional Equitable Relief

A hearing officer enjoys broad discretion to craft an equitable remedy for denial of a FAPE. *See N.S. ex rel. Stein v. District of Columbia*, 709 F.Supp.2d 57, 73 (D.D.C.2010) (Once a Court finds that a public school district has failed to offer a FAPE, the Court is authorized to "grant such relief as the court determines is appropriate.") "Under this provision [20 U.S.C. § 1415(i)(2)(C)(iii)], equitable considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing." *Florence County, supra*, 510 U.S. at 16, 114 S.Ct. 361 (internal quotation marks and citations omitted). I find that Student's school nonattendance at the beginning of the 2014-2015 school year, and the failure of DCPS to address the problem for eight weeks, are extraordinary factors in this case which warrant additional equitable relief –

specifically independent assessment by a qualified professional of the causes of Student's school avoidance with recommendations for interventions.

I have considered the testimony of Clinical Psychologist and concluded, as explained above in this decision, that her opinion that Student's nonattendance is due to a Social Anxiety Disorder is not credible without further corroborative support. At the October 14, 2014 IEP meeting, the DCPS representatives discussed conducting updated assessments of Student, but, as of the due process hearing, there was no evidence that a reevaluation had been conducted. In consideration of the failure of DCPS to address Student's nonattendance at school for eight weeks and the importance of understanding the causes of Student's school avoidance behavior in order to revise his IEP or BIP, as appropriate, as additional equitable relief, I will order DCPS to obtain an IEE diagnostic psychological assessment of Student, tasked with determining whether any underlying psychological condition is affecting Student's willingness to attend school and, if so, to provide recommendations for appropriate services, placement and accommodations to be incorporated into Student's IEP.

ORDER

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

ORDERED:

1. As compensatory education, DCPS shall provide Student 225 hours of independent one-on-one tutoring in such academic subjects and on a schedule as may be reasonably agreed upon between the Guardian and DCPS. DCPS may provide the tutoring services through a qualified DCPS employee or a private provider. The tutoring services must be used no later than the end of the 2015-2016 regular school year or will be forfeited;
2. As compensatory education, DCPS shall fund Student's enrollment, with transportation, in two credit hours of credit-recovery classes to be provided by a qualified private provider such as Seeds of Tomorrow or a comparable organization. The DCPS-funded credit recovery classes must

be completed prior to the beginning of the 2015-2016 school year or will be forfeited;

3. As additional equitable relief, subject to obtaining the written consent of the Guardian, DCPS shall promptly obtain an independent diagnostic psychological assessment of Student to assess the causes of Student's school avoidance behaviors and to provide recommendations for addressing those behaviors through IEP services and accommodations and/or behavioral interventions. The purpose of the new assessment is to obtain objective, impartial data for consideration by Student's IEP team as a guide to appropriate revisions to Student's IEP. Accordingly, the assessor shall be a qualified clinical psychologist, reasonably agreed upon by DCPS and the guardian, who shall not be one of the independent providers who has previously evaluated Student. Upon receipt of the completed diagnostic psychological evaluation report, DCPS shall promptly convene Student's IEP team to review the assessment and other relevant data and to revise, as appropriate, Student's IEP; and
4. All other relief requested by the Guardian herein is denied.

Date: December 30, 2014

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).