

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: August 27, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2015-0225

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: July 29, 2015

Respondent.

Office of Dispute Resolution, Room 2004
Washington, D.C.

HEARING OFFICER DETERMINATION (CORRECTED)

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or FATHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Titles 5-B, Chapter 5-B25 and 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In his expedited due process hearing request, Petitioner appealed an April 2015 determination by Respondent District of Columbia Public Schools' (DCPS) Manifestation Determination Review (MDR) team that Student's code of conduct violation was not a manifestation of his disability. Petitioner also alleged that Student's March 9, 2015 IEP are inappropriate and that DCPS denied Student a free appropriate

¹ Personal identification information is provided in Appendix A.

public education (FAPE) by failing to provide school transportation following his April 2015 suspension from CITY MIDDLE SCHOOL.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 1, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on July 2, 2015. On July 20, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The parties met for a resolution session on July 27, 2015 and did not resolve the due process complaint.

The expedited due process hearing was held before this Impartial Hearing Officer on July 29, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses NONPUBLIC SCHOOL PRINCIPAL, EDUCATIONAL ADVOCATE, LICENSED PSYCHOLOGIST, and VOLUNTEER ADVOCATE. DCPS called no witnesses. Petitioner's Exhibits P-6 through P-22, P-24, P-33, P-34, P-35, P-38, P-57 and P-60 were admitted into evidence, including Exhibits P-20 through P-22, P-24 and P-33 through P-35 admitted over DCPS' objections. Exhibits P-39 through P-56 were admitted, over DCPS' objections, as records considered by Licensed Psychologist for her expert opinions, but not for the truth of the matters stated in the exhibits. DCPS' objections to Exhibits P-1 through P-5, P-25 and P-27 were sustained. Exhibits P-23, P-26, P-28 through P-32, P-36, P-37, P-58 and P-59 were withdrawn. DCPS' Exhibits R-7 through R-12 were admitted into evidence without objection. Exhibits R-1 through R-6 were not offered. Petitioner's Counsel made an

opening statement. Counsel for both parties made closing arguments. Neither party requested leave to file post hearing written argument.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the July 20, 2015

Prehearing Order:

1. Whether Student's MDR team erred in determining that the assaultive behavior which led to Student's suspension on or about April 2015, was not a manifestation of his disability;
2. Whether Student's March 9, 2015 IEP and placement are inappropriate because his IEP and placement are not sufficiently restrictive, in that the IEP does not provide up to full time special education, outside of general education, has inadequate social-emotional and written language goals, and lacks an appropriate updated Behavior Intervention Plan (BIP);
3. Whether DCPS denied Student a FAPE by failing to conduct an appropriate behavioral/social emotional functioning assessment or a clinical assessment contemporaneous with his long-term suspension in April 2015;
4. Whether DCPS denied Student a FAPE by failing to timely review and revise as appropriate Student's IEP contemporaneous with his long-term suspension from City Middle School in April 2015; and
5. Whether DCPS failed to implement Student's IEP and denied him a FAPE by failing to provide school transportation when Student was initially placed at ALTERNATIVE SCHOOL following his April 2015 suspension from City Middle School.

For relief, Petitioner originally requested that the Hearing Officer determine that Student's conduct, which resulted in his suspension from school in April 2015, was a manifestation of his disability and further order DCPS to,

- a. Ensure that an appropriate revised IEP is developed for Student with appropriate goals and areas of academic concern correctly identified, as well as an

appropriate level of services;

b. Ensure that Student is provided an appropriate educational placement in his least restrictive environment;

c. Ensure that Student's IEP is revised to provide appropriate behavioral support/counseling services and a BIP;

d. Immediately and fully implement Student's IEP, along with all related services, including school transportation;

e. Conduct or fund an independent functional behavioral assessment (FBA), clinical and or a social history; and

f. Provide or fund a suitable public or non-public location of services to implement Student's revised IEP.

Petitioner also sought an award of compensatory education for the denials of FAPE alleged in his complaint.

At the beginning of the due process hearing on July 29, 2015, DCPS' Counsel represented on the record that DCPS had "reversed" the April 2015 MDR team determination and had agreed that Student's code of conduct violation was a manifestation of his disability. DCPS agreed to provide compensatory education to compensate Student for the original erroneous MDR team determination and for initially failing to provide transportation for Student to attend Alternative School during his suspension. Counsel further represented that DCPS had agreed to conduct an FBA of Student and develop a BIP at the beginning of the 2015-2016 school year. Lastly, DCPS affirms that Student may return immediately to his placement at City Middle School.² Petitioner's Counsel agreed that the only remaining issues for determination in this case are the appropriateness of Student's March 9, 2015 IEP and the suitability of Student's educational placement at City Middle School.

² Petitioner's evidence established that Student returned to City Middle School on May 27, 2015.

FINDINGS OF FACT

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

1. Student, an AGE youth, resides with Father in the District of Columbia.

Testimony of Father.

2. Student is eligible for special education and related services under the primary disability classification Other Health Impairment/Attention Deficit Disorder or Attention Deficit-Hyperactivity Disorder (OHI-ADHD). Student was initially determined eligible on February 27, 2015 by a Multidisciplinary Team (MDT) at City Middle School.

Exhibit P-7.

3. Student's initial IEP was developed at an IEP team meeting on March 9, 2015. His IEP identified Mathematics, Reading, and Emotional, Social and Behavioral Development as areas of concern. The IEP provided that Student would receive four hours per week of Specialized Instruction and 120 minutes per month of Behavioral Support Services, all outside general education. The IEP team specified that Student's disruptive behavior impeded his learning or that of other children. Exhibit P-6. Father consented to the initial provision of special education and related services to Student.

Exhibit P-7.

4. DCPS SCHOOL PSYCHOLOGIST conducted a psychological evaluation of Student on November 13, 2014. She reported that Student's grades in Reading, Language Arts and Mathematics were in the Low Range. On cognitive testing using the Reynolds Intellectual Assessment Scales (RIAS), Student's Composite Intelligence Index and Composite Memory Index both scored at 79 – in the Moderately Below Average

range. On the Woodcock-Johnson Tests of Cognitive Abilities, Student scored in the Low range on the Comprehension Knowledge cluster and in the Very Low range in the Processing Speed cluster. Student's scores on academic performance, using the Kaufman Test of Education Achievement - Second Edition (KTEA-II) were all in the Below Average range. Exhibit P-8.

5. On the Conners 3rd Edition (Conners 3) measure of ADHD and associated disorders, rating scale responses from Father and a teacher indicated elevated or very elevated scores for Inattention, Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, Aggression, and Peer Relations. Student's Conners 3 Global Index Total was in the Highly Significant Percentile Rank. Exhibit P-8.

6. School Psychologist had a teacher and Father complete the Behavior Assessment System for Children, Second Edition (BASC-2) rating scales. In both the teacher's and Father's responses, Externalizing Problems and Behavioral Symptoms Index scores were clinically significant. The Externalizing Problems composite score characterizes disruptive behaviors, aggression, and conduct problems. The Behavior Systems Index includes subscales assessing hyperactivity, aggression, depression, attention, atypicality and withdrawal. Exhibit P-8.

7. School Psychologist had a teacher provide responses on the Behavior Rating Inventory of Executive Function (BRIEF). The teacher's responses on the BRIEF indicated areas of concern including Student's ability to inhibit impulsive responses, to adjust to change in routine or task demands, to modulate emotions, to initiate problem solving or activity, to sustain working memory, to plan and organize problem solving approaches, to organize his environment and materials and to monitor his own behavior. These responses indicated that Student exhibited difficulty with some aspects of

executive function. Exhibit P-8.

8. At the time the March 9, 2015 IEP was developed, Student had D's or F's in all of his core academic courses. He was reported to be performing three or four grade levels behind in Mathematics and Reading. Exhibits P-6, P-14.

9. Student's ELA teacher reported to School Psychologist that during class, Student had great difficulty concentrating and was easily distracted, that he had frequent temper tantrums which tended to be daily, some more explosive than others, and that Student did much better in a small group setting, where he received a lot of attention from the teacher. School Psychologist reported in her December 12, 2014 psychological evaluation report that test results suggested that Student's symptoms related to ADHD were impeding his ability to access grade-level material. Exhibit P-8.

10. School Psychologist concluded in her December 12, 2014 Psychological Evaluation report that her test results and Student's cumulative records supported the disability classification of OHI-ADHD, which adversely impacts Student's academic performance in the classroom. Exhibit P-8.

11. Beginning in July 2014, Student started receiving Community-Based Intervention (CBI) services through SOCIAL SERVICES AGENCY in the District. Student's then-current symptoms/behaviors were reported to be difficulty sustaining attention, inability to focus on schoolwork and homework, not listening when spoken to directly, often avoiding "dislikes", talking excessively, difficulty sitting still, poor concentration, climbing and swinging from auditorium lights, stealing, lying to his father, conning, having set fire to handheld sanitizer in school, smoking cigarettes, constant fidgeting, forming a gang and having stabbed himself with a pencil, in 2012, which resulted in hospitalization in a mental health facility. As of July 2014, Student was

involved with the Arlington County, Virginia court system following an alleged theft from a big-box store. Social Services Agency diagnosed Student with ADHD, predominant Hyperactive-Impulsive type. Exhibit P-56. Student continued to receive CBI services from Social Services Agency through the spring of 2015. Exhibit P-40.

12. On March 3, 2015, Student was allegedly involved in an incident described as an assault on a school staff member at City Middle School. The school disciplined Student with a 50 day off-site suspension. Exhibit P-19. An MDR meeting was convened at City Middle School on March 10, 2015. Father attended the meeting. The MDR team apparently determined that Student's behavior was not a manifestation of his disability. (The Manifestation Determination form states "Yes" to the question "Was the conduct in question caused by, or did it have a direct and substantial relationship to the student's disability?" However, the form also states, "Therefore the behavior: is NOT a Manifestation of the student's Disability.") Exhibit P-10.

13. Student was placed at Alternative School until May 27, 2015, when he returned to City Middle School. Testimony of Educational Advocate. Student missed approximately two weeks of school after first being assigned to Alternative School because school transportation was not provided at the beginning of the suspension period. Testimony of Volunteer Advocate.

14. On July 27, 2015, two days before the due process hearing, a resolution meeting, including an MDT/IEP team meeting, was convened for Student at which the March 10, 2015 MDR determination was reconsidered. At the July 27, 2015 meeting, it was determined that Student's code of conduct violation on March 3, 2015 was caused by or had a direct and substantial relationship to his disability and that the conduct was the direct result of DCPS' failure to implement Student's IEP. Exhibit R-9.

15. Student's IEP was revised at the July 27, 2015 MDT/IEP team meeting to add goals for Written Expression and to increase his Specialized Instruction Services to 15 hours per week and his Behavioral Support Services to 240 minutes per month, all outside general education. Exhibit R-10.

16. Prior to his suspension from school in March 2015, Student's grades in core curriculum subjects at City Middle School were mostly D's and F's. Exhibit P-14. His grades for Term 4 at Alternative School were all D's except for a C in Mathematics. Exhibit P-15. Student did not do well after he returned to City Middle School in late May 2015. Testimony of Educational Advocate.

17. Student has been accepted at Nonpublic School for the 2015-2016 school year. Nonpublic School is a very small private day school in suburban Maryland, serving some 16 students with disabilities in grades 6 through 12. There are currently three students enrolled in the middle school grades. Therapy services are fully integrated into the Nonpublic School program. The tuition cost at Nonpublic School is approximately \$54,400 per year. Nonpublic School has a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Principal.

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,*

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

Was Student's March 9, 2015 IEP and placement inappropriate because his IEP and placement were not sufficiently restrictive, in that the IEP did not provide up to full time special education, outside of general education, and because the IEP had inadequate social-emotional and written language goals?³

At the July 27, 2015 resolution meeting in this case, the parties partially resolved the issues in dispute. In oral argument, Petitioner's Counsel asserted that the remaining issues to be decided are whether Student's March 9, 2015 IEP was inappropriate because it lacked annual goals for written expression and because the IEP annual goals for social, emotional and behavioral development were inadequate. DCPS responds that annual goals for Written Expression were added in Student's July 27, 2015 revised IEP.

Petitioner also contends that Student requires a full-time special education placement outside general education. DCPS responds that there has been insufficient time to evaluate the effectiveness of Student's initial March 2015 IEP and that the evidence does not establish that Student requires a full-time special education placement.

To determine whether a revised IEP is adequate to provide a FAPE, a hearing officer must determine "[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations

³ This issue, as identified in the Prehearing Order, also included the allegation that the IEP lacked an appropriate updated Behavior Intervention Plan (BIP). DCPS has agreed to conduct an FBA of Student and to develop a BIP at the beginning of the 2015-2016 school year. Whether the March 9, 2015 IEP was inadequate for want of an updated BIP is no longer an issue in this case.

imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (*Rowley*). Petitioner has not raised an IDEA procedural issue with respect to the development of the March 9, 2015 IEP. Therefore, I turn to the second prong of the *Rowley* inquiry: Was the March 9, 2015 IEP reasonably calculated to enable Student to receive educational benefits?

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; see also *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be “more appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

K.S. 962 F.Supp.2d at 200-221. “[B]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . .

the measure and adequacy of an IEP can only be determined as of the time it is offered to the student.” *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66-67 (D.D.C. 2008) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) (internal quotation marks and citation omitted).

A.
Annual Goals

Petitioner alleges that the March 9, 2015 IEP annual goals were inadequate because there were no annual goals for Written Expression and because the annual goals for Social, Emotional and Behavioral Development were not adequate. The IDEA requires that each student’s IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

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

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

See 34 CFR § 300.320(a)(2)(i). *See, also, Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598 (1988) (IEP sets out the child’s present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.) The Act does not require goals to be written for each specific discipline. *See* Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46662 (August 14, 2006). The hearing evidence in this case does not establish whether, as of March 9, 2015, Student required annual goals in written expression to meet his needs resulting from his ADHD disability. On the KTEA-III administered in November 2014, Student’s Standard Score of 71 in Written Expression

was “Below Average” but not in the lowest category, “Lower Extreme.”

Licensed Psychologist testified that Student needs support “all day long,” including pull-out classes for reading, math and writing. However, Licensed Psychologist did not evaluate Student and she did not opine that his March 9, 2015 IEP should have included annual goals for Written Expression. (At the July 27, 2015 resolution meeting for this case, DCPS agreed that annual goals for Written Expression would be added to Student’s IEP to “alleviate the complaint that there were no writing goals.” Annual Goals for Written Expression are included in the July 27, 2015 revised IEP.)

Both the March 9, 2015 and the July 27, 2015 IEPs contain annual goals for Emotional, Social and Behavioral Development targeting off-task behavior, self-regulation and inappropriate behavior and language/gestures. At the due process hearing, no evidence was adduced that these goals were not appropriate to meet Student’s needs. I find that Petitioner has not met his burden of proof that when the March 9, 2015 IEP was offered to Student, the IEP annual goals for Emotional, Social and Behavioral Development were inadequate or that Student required annual goals for Written Expression to meet his needs that resulted from his ADHD disability.

B.

Appropriateness of IEP Special Education and Related Services

Student’s March 9, 2015 IEP provided very limited Special Education and Related Services. For Specialized Instruction, the IEP provided four hours per week of services outside general education. The March 9, 2015 IEP also provided Student 120 minutes per month of Behavioral Support Services. Petitioner contends that these services were not reasonably calculated to enable Student to receive educational benefits and that

Student should have been placed in “up to full-time special education.” DCPS responds that as an initial IEP, the March 9, 2015 plan was appropriate. In the July 27, 2015 revised IEP, the IEP team increased Student’s Specialized Instruction to 15 hours per week and increased his Behavioral Support Services to 240 minutes per month.

At the time the March 9, 2015 IEP was developed, Student had D’s or F’s in all of his core curriculum courses. He was reported to be performing three or four grade levels behind in Mathematics and Reading. In the classroom, Student presented with high distractibility, non-compliance, daily temper tantrums and difficulty managing his emotions. His teachers reported that he could become disruptive in the classroom and had difficulty following directions. School Psychologist reported in her December 12, 2014 psychological evaluation report that test results suggested that Student’s symptoms related to ADHD were impeding his ability to access grade-level material. Petitioner’s expert, Licensed Psychologist, opined that based upon her review of Student’s records, the provision of only four hours per week of Specialized Instruction and 30 minutes per week of Behavioral Support was not sufficient and that Student required at least 15 hours per week of Specialized Instruction in Reading, Math and Writing, outside general education, and inclusion support for the rest of the school day. She also opined that Student requires at least one hour per week of Behavioral Support Services. Licensed Psychologist’s testimony was not rebutted by DCPS. Taking into account Student’s academic deficits, his behavioral problems in school and the opinion of Licensed Psychologist, I conclude that Petitioner has met his burden of proof to establish that the March 9, 2015 IEP was not reasonably calculated for Student to receive educational benefits and that Student was denied a FAPE by the very limited special education and related services provided in the IEP.

The hearing evidence does not establish what would be a suitable educational placement for Student, except that he does not require placement in a full-time special education school. In my order in this decision, I will require DCPS to ensure that Student's IEP team reviews and revises his educational placement, as appropriate, based upon updated current data.

Remedy

In this decision, I have found that Student was denied a FAPE by DCPS' March 9, 2015 IEP which was not reasonably calculated to provide educational benefits. For his requested remedy, Petitioner seeks, *inter alia*, an order for DCPS to fund Student's placement at Nonpublic School and an award of compensatory education.

Private School Placement

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005) (citations omitted).

Placement awards, must be tailored to meet the child's specific needs. *Branham, supra*. To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the

student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student has an ADHD disability which impedes his ability to access grade level material. He is functioning academically in the very low range which impacts his performance in the class room setting. In the classroom, Student presented with high distractibility, non-compliance and difficulty managing his emotions. His teachers reported that he could become disruptive in the classroom and had difficulty following directions. During the 2014-2015 school year, Student was suspended for an alleged assault upon a teacher. His grades for the 2014-2015 school year have been almost all D's and F's.

b. Student's Specialized Educational Needs

According to the unrebutted testimony of Licensed Psychologist, Student requires 15 hours per week of Specialized Instruction outside general education, inclusion special education for the rest of his school day and one hour per week of Behavioral Support Services.

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

Nonpublic School is a full-time special education day program. It is a very small program with only 16 students in the entire school. All of the students are children with disabilities. At Nonpublic School, Student would be placed in a small class of 4 students with a 4:1 student to teacher ratio. While this setting may be beneficial for Student, the

evidence does not establish that he requires such a restrictive setting.

d. Cost of Placement at Nonpublic School

The cost of tuition at Nonpublic School is approximately \$54,400 per year. DCPS offered no evidence that tuition expenses at Nonpublic School are higher than costs at other local private schools serving students with disabilities.

e. Least Restrictive Environment

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of his disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. The IDEA requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). “In determining the least restrictive environment, consideration is given to the types of services that the child requires.” *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 34 C.F.R. § 300.552(d)). The Act further requires that the educational placement 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 *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 200, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). *See, also, N.T. v. District of Columbia*, 839 F.Supp.2d 29, 35 n.3 (D.D.C.2012) (Hearing Officer could consider whether private school was the least restrictive environment in evaluating whether private placement was

the proper remedy.)

The evidence in this case does not establish that the least restrictive environment for Student is a special school where he would not be educated with nondisabled peers. To the contrary, Petitioner's expert, Licensed Psychologist, recommended in her compensatory education plan that Student be served in an inclusion setting with his nondisabled peers for all but 15 hours per week. Therefore, considering all of the above factors, I conclude that Petitioner has not shown that Nonpublic School is an appropriate placement for Student.

Compensatory Education

If a parent has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial.

Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA.

Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a 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 school district's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid v. District of Columbia*, *supra*, 401 F.3d at 518.)

Here, Petitioner's Expert, Licensed Psychologist, opined, without rebuttal, that Student's initial IEP should have provided for full-time Specialized Instruction – divided

between 15 hours per week outside special education and inclusion services in the regular education classroom for the rest of the school day. She also opined that Student should have been provided one hour per week of Behavioral Support Services. After the March 9, 2015 IEP was developed, for a period of some three months, Student was provided only 4 hours per week of Specialized Instruction, arguably a deficit of some 260 hours of Specialized Instruction including inclusion services. During the same period Student was provided one-half of the 12 hours of Behavioral Support Services recommended by Licensed Psychologist.

For Compensatory Education, Licensed Psychologist recommended that Student be provided 59 hours of academic tutoring in reading, writing and mathematics and 20 hours of counseling. At the July 27, 2015 resolution meeting in this case, DCPS provided authorization for Father to obtain 50 hours of independent tutoring and 20 hours of Behavioral Support Services for Student. Exhibit R-11. On July 28, 2015, DCPS authorized an additional 10 hours of tutoring. Exhibit R-12. Therefore, I find that DCPS has authorized all of the compensatory education services recommended by Licensed Psychologist and I decline to award additional compensatory education.

Other 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 Sch. Dist. Four v. Carter*, 510 U.S. 7, 16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (internal quotation

marks and citations omitted).

In this case, Student's IEP was hastily revised by a summer IEP team at a resolution meeting on July 27, 2015. Although the revised IEP provides the hours of Specialized Instruction outside general education and hours of behavioral support services recommended in Licensed Psychologist's compensatory education report, it omits the Specialized Instruction inclusion services also recommended by Licensed Psychologist. Moreover, Licensed Psychologist has never met or evaluated Student and I find that the IEP team's decision to partially adopt her recommendations, without obtaining additional data, is problematical.

The IDEA requires that the District ensure that every IEP is based upon the "individualized consideration of and instruction for each child." *See Rowley, supra*, at 189-190. The IDEA regulations, § 300.324, require that the District ensure that IEP Teams carefully consider all available information in developing an IEP, including information from the child's parents. The IEP team must be provided data sufficient to inform its consideration of the individualized academic, developmental, and functional needs of Student. *See* 34 CFR § 300.324(a). Here, such data was clearly lacking. The academic Present Levels of Performance (PLOP) in the July 27, 2015 IEP are copied from the March 9, 2015 IEP, except for the Written Expression area. For Written Expression, the PLOP lacks any data, except for the reference to Student's Below Average score for written expression on the WJ-III assessment administered as part of the November 2014 psychological evaluation. The PLOP for Emotional, Social and Behavioral Development are based, primarily, upon dated records from Social Services Agency. Furthermore, the December 12, 2014 DCPS psychological evaluation report, referenced in the July 27, 2015 IEP, offers only very sparse analysis of Student's special education and related services

needs. In sum, I find that the July 27, 2015 IEP team lacked sufficient current data to determine Student's unique needs for special education and related services. See *McKenzie v. Smith*, 771 F.2d 1527, 1533 (D.C.Cir.1985) (“[I]mpossible to discern from DCPS’ actions the kind of individualized consideration of a handicapped child’s “unique needs,” *Rowley*, 458 U.S. at 181, 102 S.Ct. at 3038, which Congress intended.”) Therefore, I will order DCPS to conduct a thorough comprehensive psychoeducational reevaluation of Student and to reconvene Student’s IEP team to review the updated data and revise his IEP, including his educational placement, as appropriate.

ORDER

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

ORDERED:

1. DCPS is ordered, subject to obtaining consent from the parent, to obtain a new comprehensive psychoeducational evaluation of Student, conducted by a DCPS psychologist or by a qualified, independent, psychologist. Said reevaluation shall be conducted within 30 calendar days of this issuance of this order. Upon receipt of the completed evaluation, DCPS shall promptly convene Student’s IEP team to review and revise, as appropriate, his IEP and educational placement;
- ii. At the July 27, 2015 resolution meeting in this case, DCPS provided authorization for Father to obtain 50 hours of independent tutoring and 20 hours of independent Behavioral Support Services for Student. On July 28, 2015, DCPS authorized an additional 10 hours of independent tutoring. In consideration whereof, I decline to award additional compensatory education; and
- iii. All other relief requested by the Petitioner herein is denied.

Date: August 27, 2015

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).