

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

OSSE
Office of Dispute Resolution
August 11, 2015

PETITIONER, on behalf of)	
STUDENT, ¹)	Date Issued: August 11, 2015
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2015-0185
)	
DISTRICT OF COLUMBIA)	Hearing Dates: July 16 and 24, 2015
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution,
Respondent.)	Rooms 2004 and 2006
)	Washington, D.C.
)	

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 FATHER), 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 (D.C. Regs.). In his due process complaint, Petitioner alleges that respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to offer her appropriate Individualized Education Programs (IEP) and educational placements since the 2013-2014 school year.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on May 21, 2015, named DCPS as respondent. The

¹ Personal identification information is provided in Appendix A.

undersigned Hearing Officer was appointed on May 22, 2015. The parties met for a resolution session on June 4, 2015, but did not reach an agreement. The 45-day period for issuance of this Hearing Officer Determination began on June 21, 2015. On June 24, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. On July 28, 2015, I granted Petitioner's unopposed motion for a 10-day continuance of the due date for the final decision in this case.

The due process hearing was held before this Impartial Hearing Officer on July 16 and 24, 2015 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. 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 LICENSED PSYCHOLOGIST, GUARDIAN AD LITEM, Student, and NONPUBLIC SCHOOL PROGRAM SUPERVISOR. DCPS called as witnesses SPECIAL EDUCATION TEACHER and RESOLUTION SPECIALIST. Petitioner's Exhibits P-1 through P-32 and P-34 through P-41 were admitted into evidence without objection. Exhibits P-33, and P-42 through P-44 were not offered. DCPS' Exhibits R-1 through R-25 were admitted into evidence without objection. Counsel for the respective parties made closing arguments. Neither party requested leave to file a post-hearing brief.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issue for determination was certified in the June 24, 2015

Prehearing Order:

- Whether Student was denied a FAPE by DCPS' October 6, 2014 IEP because DCPS refused to identify Student as eligible for services under the category of multiple disabilities, and did not provide a program for concurrent ID and ED disabilities, because DCPS failed to provide Student with a full time separate day school program and because the IEP contains inadequate and inappropriate transition goals and services;
- Whether DCPS denied Student a FAPE by failing to conduct updated FBA's and to revise Student's BIP and failed to address truancy during the 2013-2014 and 2014-2015 school years;
- Whether during the 2014-2015 school year, DCPS denied Student a FAPE by failing to ensure that her functional behavioral assessment and behavior intervention plan were appropriately updated;
- Whether DCPS denied Student a FAPE by failing to develop an appropriate Individualized Education Program on or about December 2, 2013, because the IEP team refused to add goals to address Student's truancy and failed to provide Student with a therapeutic outside of general education setting as her LRE;
- Whether during the 2014-2015 school year, DCPS failed to fully implement Student's Individualized Education Program by not providing all of the specialized instruction and related counseling services required by her IEP; and
- Whether Student should be provided compensatory education for harm incurred from December 5, 2012 through October 2014 for DCPS' failure to identify Student as having an ED disability and failure to provide appropriate services, programming and placement.

For relief, Petitioner requests that the Hearing Officer order DCPS to adjust Student's school schedule to ensure that she is provided 26 hours of specialized instruction outside general education and weekly counseling services; to amend Student's IEP to update her transition plan, to include goals relating to attendance issues and to fund Student's placement at Nonpublic School.

Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in the complaint and for the denial of FAPE found in a prior, May 12, 2013, Hearing Officer Determination.

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 is an AGE legal resident of the District of Columbia. Student is currently living in a foster care home in Maryland, where she has been placed by the government of the District of Columbia. Testimony of Guardian *ad litem*. Student has been identified as eligible for special education and related services, currently under the primary disability classification Emotional Disturbance (ED). Exhibit P-41.

2. Student's home life has been unstable for a lengthy period. She no longer lives with Father. In April 2014, she was placed with a foster family in Maryland which only lasted for several months. Next she was placed with another Maryland foster family until fall of 2014. Then she returned to live with Father in the District. Since June 2015, Student has been placed in another foster home in Maryland. Student has a daughter who is now more than two years old. Testimony of Guardian *ad Litem*, Exhibit P-1.

3. In a psychoeducational evaluation conducted in 2005 by DCPS, Student's scores on cognitive testing were in the Extremely Low range. Her academic skills were reported to have ranged from Average to Low. Special education services were recommended as well as psychological counseling to address behavioral issues involving difficulty staying focused, out-of-seat behavior and lack of participation in class. Exhibit P-33.

4. Following a DCPS psychological reevaluation in December 2011, Student's full scale IQ score was reported to be 60, in the Extremely Low range and her overall level of academic achievement was within the Very Low range. The DCPS school

psychologist reported that Student was thought to continue to meet criteria regarding educationally handicapping conditions as an Intellectually Disabled student. Exhibit P-33.

5. Student's December 5, 2012 IEP identified her primary disability as ID. Exhibit P-24. Beginning with a May 23, 2013 IEP amendment, Student's DCPS IEPs have provided for 25 or more hours per week of Specialized Instruction. Exhibit P-11.

6. In a Hearing Officer Determination issued on May 12, 2013 in Case No. 2013-0104, former Hearing Officer Kimm Massey found that Student had a history of emotional issues and behavioral problems that impacted her negatively in school. Hearing Officer Massey concluded that DCPS had denied Student a Free Appropriate Public Education (FAPE) by failing to collect the data necessary to determine whether she required the additional disability classification of ED and additional behavioral supports in her IEP. Hearing Officer Massey ordered, *inter alia*, that DCPS conduct a clinical assessment of Student sufficient to determine whether she should be classified as ED and, if so, what support Student required to address her social/emotional needs. In the May 12, 2013 HOD, Hearing Officer Massey found that there was insufficient data to determine whether theretofore, Student had received deficient programming from DCPS for her alleged ED disability and the hearing officer denied, without prejudice, Petitioner's request for compensatory education. Exhibit P-10.

7. . On June 17, 2013, DCPS SCHOOL PSYCHOLOGIST completed a psychological reevaluation of Student. He concluded that based upon reports of Father and a teacher, Student's emotional disturbance/behavior difficulties were not clinically significant. Exhibit P-20.

8. On September 27, 2013, an MDT meeting was convened at City High

School to review the June 17, 2013 psychological reevaluation report. Student's special education eligibility classification was not changed. It was noted at the meeting that Student was having "trouble with attendance." The MDT team agreed that Student needed an FBA and that her behavior plan needed to be updated. Exhibit P-21.

9. The City High School IEP team convened on December 2, 2013 for an IEP annual review meeting. Father, Student and Petitioner's Counsel attended the IEP meeting. The IEP team continued the IEP related services provision for Student to receive one hour per week of Behavioral Support Services. The December 2, 2013 IEP also continued Student's full time Specialized Instruction in a self-contained classroom. Exhibit P-22.

10. In August 2014, Licensed Psychologist conducted a Independent Educational Evaluation (IEE) comprehensive psychological reevaluation of Student to assess her cognitive, academic and social-emotional functioning. In her September 4, 2014 report, Licensed Psychologist reported that Student's profile was consistent with the diagnosis of ID. She also reported, that based on behavior rating scales and Student's behavior history, clinically, Student exhibited symptoms related to mood dysregulation. Licensed Psychologist diagnosed Student with Major Depressive Disorder - Moderate and Intellectual Disability - Moderate. Exhibit P-1.

11. On September 30, 2014, a City High School social worker developed a Behavior Intervention Plan for Student to target Student's oppositional defiant behaviors, such as refusing to follow directions, physical and verbal altercations with her peers and low self-esteem. Exhibit R-19.

12. At a multidisciplinary team (MDT) meeting at City High School on October 7, 2014, Student's MDT team changed her primary disability classification to

Emotional Disturbance (ED). Exhibit R-15. Annual goals for Emotional, Social and Behavioral Development were added to Student's IEP, which was revised on October 7, 2015. Her Specialized Instruction Services were increased to 26 hours per week in a self-contained classroom setting and the IEP provided four hours per month of Behavioral Support Services. Exhibit P-2.

13. At the beginning of the 2014-2015 school year, Student was placed in the City High School self-contained classroom for ID students. After her IEP was revised in October 2014, Student was moved to the self-contained ED classroom. The ID classroom has no more than seven students with a teacher and at least one aide. The ED classroom has around 15 students. The ED classroom was staffed with a teacher as well as a behavior technician and an aide. Testimony of Case Worker.

14. The October 7, 2014 IEP includes a Post-Secondary Transition Plan based upon an interview with Student and a Brigance Transition Skills Inventory administered in September 2014. Exhibits P-2, R-13. The transition plan includes long range employment goals (health aide for the elderly), a short term goal to be able to complete a job application, independent living skills goals and identified transition services to meet quarterly with the transition coordinator to receive transition supports and services. Exhibit P-2.

15. When Student was present in class during the 2014-2015 school year, she did very well. She participated in class, had very good study skills, was a leader, grasped concepts quickly and usually got 100% scores. Testimony of Case Worker.

16. Since enrolling in City High School, Student's attendance record has been very poor. For the 2013-2014 school year, as of May 12, 2014, Student had 81 days of unexcused absences. Exhibit P-25. She had "horrible" attendance in school for the

2014-2015 school year. Testimony of Case Manager, Exhibit R-16. As of June 2, 2015, Student had been present for 62 out of 171 membership days. Exhibit P-41.

17. During the 2014-2015 school year, City High School staff attempted to call Father several times about Student's attendance but were not able to get in touch with him. Exhibit R-1. The school social worker spoke to Student's outside service providers, but the providers did not know where Student was. Other students reported that Student was out "running the streets." When Student did return to school, the Assistant Principal, the Special Education Coordinator and the school social worker all spoke to Student about the importance of school attendance, but their admonitions did no good. DCPS made a truancy referral on Student, which led to a court appearance in May 2015. Testimony of Case Worker. Student testified that she skipped several classes because she did not like the classes or the teachers. Testimony of Student. Father testified that he picks Student up every day and knows she goes to school. To the extent that Father maintained that Student did not have an attendance problem, I found Case Worker's testimony to the contrary, supported by DCPS' documentation, more credible.

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 the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. 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).

A.

Did DCPS deny Student a FAPE by failing to develop an appropriate Individualized Education Program on or about December 2, 2013, because the IEP team refused to add goals to address the Student's truancy and failed to provide the Student with a therapeutic outside general education setting as her least restrictive environment?

On May 12, 2013, former Hearing Officer Massey ordered DCPS to convene Student's IEP team to revise her IEP to include 25 hours per week of Specialized Instruction. She also ordered DCPS to conduct a clinical assessment of Student, within 15 school days, to determine whether she should be classified as ED, and within 15 days of receipt of the clinical assessment report, to again convene Student's IEP team to review and revise, as appropriate, her IEP. On May 23, 2013, Student's IEP was amended to increase her Specialized Instruction Services hours. On June 17, 2013, DCPS School Psychologist completed a psychological reevaluation of Student. He concluded that based upon reports of Father and a teacher, Student's emotional disturbance/behavior difficulties were not clinically significant. On September 27, 2013, an MDT meeting was convened to review the June 17, 2013 psychological evaluation report. It was noted at the meeting that Student was having "trouble with attendance." The MDT team agreed that Student needed an FBA and that her behavior plan needed to be updated.²

² Following the September 27, 2013 MDT meeting, Petitioner's Counsel advised DCPS that the parent disagreed with the DCPS' psychological evaluation and requested an IEE evaluation pursuant to 34 CFR § 300.502(b). Licensed Psychologist attempted to conduct an IEE psychological evaluation beginning in October 2013, but was unable to assess Student because she was not in her classes at City High School. Licensed Psychologist finally was able to evaluate Student in August 2014. She issued her IEE report on September 4, 2014.

Student's City High School IEP team convened on December 2, 2013 for an IEP annual review meeting. Father, Student and Petitioner's Counsel attended the IEP meeting. The December 2, 2013 IEP continued Student's full time Specialized Instruction in a self-contained classroom and the provision of one hour per week of Behavioral Support Services. Petitioner contends that the December 2, 2013 IEP was inadequate because it lacked specific goals to address Student's truancy and did not provide Student with a "therapeutic" outside general education setting.

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.

With regard to the omission of specific goals in the December 2, 2013 IEP to address Student's truancy, the IDEA requires that each child's IEP must include annual goals to enable the child to be involved in and make progress in the general education. *See* 34 CFR § 300.320(a)(2). The IDEA also requires that, in the case of a child whose behavior impedes his learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). The Act does not require that the behavior intervention plan be incorporated into the student's IEP. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir.2006).

At the September 27, 2013 MDT meeting, it was agreed that an FBA needed to be conducted and that Student's behavior plan needed to be updated to address attendance problems. Assuming that Student's BIP was updated following the September 27, 2013 MDT meeting to address Student's attendance issues – and Petitioner offered no evidence to the contrary – I find that Petitioner has not shown that in order to provide Student educational benefit, the December 2, 2013 IEP also had to include annual goals to address Student's truancy. *See Coleman v. Pottstown School Dist.*, 983 F.Supp.2d 543, 570 -571 (E.D.Pa.2013) (The case law does not support a finding that Defendant failed to meet its statutory obligations because the Defendant District took proactive steps to address R.J.'s behavior.)

Petitioner also contends that the December 2, 2013 IEP was inappropriate because it did not provide the Student with a "therapeutic" outside general education setting as her least restrictive environment. Student's alleged need for a "therapeutic" educational setting was first advanced in Licensed Psychologist's September 4, 2014 IEE psychological reevaluation report. Obviously this recommendation was not available to

the December 2, 2013 IEP team. The IEP team did have the June 2013 report of DCPS School Psychologist, who concluded that Student's emotional disturbance and behavior difficulties were not clinically significant. The December 2, 2013 IEP provided that Student would receive 26 hours per week of Specialized Instruction in a self-contained classroom setting as well as one hour per week Behavioral Support Services. I find that Petitioner has not shown that when the December 2, 2013 IEP was developed, the IEP was inappropriate because it did not specify that Student required a therapeutic setting. *See District of Columbia v. Walker, supra*, 2015 WL 3646779, 6 (The "adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.")

B.

Was Student denied a FAPE by DCPS' October 6, 2014 IEP because DCPS refused to identify Student as eligible for services under the category of multiple disabilities, and did not provide a program for concurrent ID and ED disabilities, because DCPS failed to provide the student with a full time separate day school program and because the IEP contained inadequate and inappropriate transition goals and services?

Petitioner contends that Student was denied a FAPE by the October 6, 2014 IEP because the IEP identified Emotional Disturbance (ED) as opposed to Multiple Disabilities (MD) as Student's primary disability and the IEP did not provide programming for both ED and Intellectual Disability (ID) disabilities. Petitioner also contends that the IEP did not meet Student's alleged need for a separate day school. Lastly, Petitioner contends that the October 6, 2014 IEP lacked appropriate transition goals and services. DCPS maintains that the IEP was appropriate for Student.

Primary Disability Classification

In her September 4, 2014 IEE Comprehensive Psychological Evaluation report, Licensed Psychologist diagnosed Student with moderate Major Depressive Disorder and

moderate Intellectual Disability. She recommended, *inter alia*, that Student had Multiple Disabilities based upon her underlying ID and ED disabilities. At an IEP meeting on October 7, 2014, the IEP team agreed that Student had both ID and ED disabilities. The IEP team revised Student's IEP to change her primary disability classification from ID to ED. The parent's representative at the meeting objected that Student's primary disability should have been identified as MD.

It is well established in the case law that so long as a student is determined eligible for special education services, the disability category on the IEP is immaterial. The IDEA does not require children to be identified with a particular disability category for purposes of the delivery of special education and related services. "[The Act] does not require that particular children be labeled with particular disabilities for purposes of service delivery, since a child's entitlement under the Act is to FAPE and not to a particular disability label." Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46737 (August 14, 2006). *See, also, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006). (Child's identified needs, not the child's disability category, determine the services that must be provided to her.); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *M.M. v. Lafayette School Dist.*, 2012 WL 398773, 17 (N.D.Cal.2012), *aff'd in part, rev'd in part on other grounds*, 2014 WL 4548725 (9th Cir.2014). (Changing the name of the disability would not have changed the necessary intervention.)

Petitioner's Counsel argues that in this case, Student's primary disability label did matter – because City High School provided separate ID and ED designated classrooms but did not offer a program for concurrent ID and ED disabilities. Counsel's focus on

the respective classroom labels is misdirected. Once an IEP is developed, the District must ensure that the student is provided an appropriate placement “based on the child’s IEP.” 34 C.F.R. § 300.116. *Hinson ex rel. N.H. v. Merritt Educational Center* 579 F.Supp.2d 89, 103 -104 (D.D.C. 2008). An appropriate location of services under the IDEA is one which can implement a student’s IEP and meet his specialized educational and behavioral needs. *See James v. District of Columbia*, 2013 WL 2650091, 4 (D.D.C. Jun. 9, 2013); *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C.2013).

Since May 24, 2013, Student’s IEPs have provided that she required a self-contained classroom setting as her full-time placement. Prior to October 7, 2014, when Student’s MDT team changed her primary disability classification from ID to ED, Student was placed in the City High School ID classroom. After October 7, 2014 until around May 2015, Student was placed in an ED classroom. Around May 2015, Student was returned to the ID classroom. Both the ID and ED classrooms are full-time self-contained classrooms, outside of the general education setting. Petitioner offered no credible evidence that the ED classroom, to which Student was assigned after October 7, 2014, was not capable of substantially implementing her IEP or that Student’s ID and ED disabilities could not both be addressed in the ED classroom at City High School. Case Manager testified that Student did well in the ED classroom when she attended. However, Student was not progressing because she did not regularly go to school. Petitioner’s expert, Licensed Psychologist, opined in her testimony that placing Student in a program for ED students caused Student harm because due to her ID disability, Student thinks about things quite differently and at a much lower level than her chronological age. However, Licensed Psychologist never observed Student in the ED classroom and she did not evidence any knowledge of what services were available in the

ED classroom or how Student's ID disability was addressed in that setting. I did not find Licensed Psychologist's opinion to be credible.

Special School

Petitioner contends, in the alternative, that the October 7, 2014 IEP was inappropriate because it did not require Student's placement at a full time separate day school. The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of her disability, a student may be instructed in regular classes, special classes, special schools, by home instruction, and instruction in hospitals and institutions. *See* 34 CFR § 300.115. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may only occur if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2)(ii).

The justification for urging Student's placement at a special school is primarily based upon Student's refusal to regularly attend City High School, not upon the nature or severity of her disabilities. Case Manager's testimony was un rebutted that Student excelled in her self-contained classroom when she attended school. However, Petitioner's expert, Licensed Psychologist, testified that when interviewed in August 2004, Student had been adamant that if she were sent back to City High School, she would not attend. Licensed Psychologist explained that she had intended to recommend a residential placement for Student, but had concluded to give a therapeutic day school "a try" because with a smaller school, more support in the classroom, and more therapeutic support, a school would be more able to keep Student in her classroom. Student's school attendance problems are well documented.

The IDEA requires that DCPS respond to Student's frequent and extended absences. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F.Supp.2d 150, 159 (D.Mass.2009) (finding that once a special education student's truancy became excessive, and where the absenteeism was a documented aspect of the student's disability, the School had an affirmative duty to take some sort of responsive action, such as reconvening the student's IEP team). However, the Act does not require school districts "to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is a neither unable to attend nor impeded by an emotional condition to a marked degree in following through on his ability to attend." *W.G. v. New York City Dept. of Educ.*, 801 F.Supp.2d 142, 170 (S.D.N.Y.2011). *See, also, Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652 (D.N.M. 2007) ("IDEA does not provide a remedy for this kind of case - where the access to a free and appropriate public education is wide open, but the student refuses to attend school and refuses the numerous and extensive educational opportunities afforded to her." *Id.*) While Student's truancy and absenteeism are well-documented as concerns which DCPS has an affirmative duty to address, I conclude that Petitioner has not established that the nature or severity of Student's disability was such that her education in a self-contained classroom in a regular public school could not be achieved or that Student required an IEP placement in a separate special education day school. *Cf. Springer v. Fairfax County School Bd.*, 134 F.3d 659, 661, 664 (4th Cir.1998) (declining to require school district to pay for residential placement when the student's poor grades resulted from lack of motivation, truancy, and a refusal to study. "[I]t is not intended to be the duty of special education to force socially maladjusted children to school by residentially placing them if they choose to remain truant.")

Transition Services

Petitioner also contends that the October 7, 2014 IEP contained inadequate and inappropriate transition goals and services. The IDEA's transition services provisions require that beginning not later than the first IEP to be in effect when the student turns 16, the IEP must include—

- (1) Appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 CFR § 300.320(b). The Act does not require transition planning or transition assessments, however the IEP transition services must always be individualized, based on the student's needs, taking into account her strengths, preferences, and interests. See 34 CFR § 300.43; Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46667 (August 14, 2006). “[I]n considering the adequacy of a myriad of transition services, an inquiring court must view those services in the aggregate and in light of the child's overall needs. The test is whether the IEP, taken in its entirety, is reasonably calculated to enable the particular child to garner educational benefits.” *Lessard v. Wilton Lyndeborough Coop. School Dist.*, 518 F.3d 18, 30 (1st Cir.2008) (citations omitted)

The Post-Secondary Transition Plan in Student's October 7, 2014 IEP was based upon an interview with Student and a Brigance Transition Skills Inventory administered in September 2014. The transition plan includes long range employment goals (health aide for the elderly), a short term goal to be able to complete a job application, independent living skills goals and identified transition services to meet quarterly with

the transition coordinator to receive transition supports and services. None of Petitioner's witnesses testified that the October 7, 2014 IEP transition plan was inadequate. Clinical Psychologist recommended a Level II vocational assessment³, but she agreed that the Brigance Transitions Skills Inventory administered to Student was a valid vocational assessment tool. I find that Petitioner has not established that the transition plan in the October 7, 2014 IEP was not reasonably calculated to enable Student to receive educational benefits.

C.

– Did DCPS deny Student a FAPE by failing to conduct updated FBA's and to revise Student's BIP and failing to address truancy during the 2013-2014 and 2014-2015 school years?

– During the 2014-2015 school year, did DCPS deny Student a FAPE by failing to ensure that her functional behavioral assessment and behavior intervention plan were appropriately updated;

The due process hearing record is replete with evidence of Student's truancy and attendance issues. When DCPS Psychologist reevaluated Student in June 2013, Student was pregnant, and according to her teacher, she had not attended school for six weeks. For the 2013-2014 school year, as of May 12, 2014, Student had 81 days of unexcused absences. Case Worker testified that in the 2014-2015 school year, Student's school attendance was "horrible." As of June 2, 2015, she had been present for only 62 out of 171 membership days. Petitioner contends that DCPS failed to ensure that City High

³ Level I vocational assessments include all of the information included in a traditional psychological evaluation, with the addition of a vocationally oriented interview and vocational interest assessment. Level II is designed for students with more severe disabilities for whom vocational decisions cannot be made without more comprehensive vocational assessment. Level II assessments include all of the procedures included in Level I and additionally include expanded medical evaluations and require work sampling procedures. Fagan and Warden, Historical Encyclopedia of School Psychology, p. 417 (1996).

School implemented appropriate behavior interventions to address Student's school attendance issues.

The IDEA requires, in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i). In *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 ("LEA") 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.)

The record establishes that Student's truancy and poor attendance have undoubtedly impeded her learning for both the 2013-2014 and 2014-2015 school years. For the 2013-2014 school year, the hearing evidence does not establish whether City High School did, or did not, adequately address Student's truancy and absences. Student's attendance problems were discussed at a September 27, 2013 MDT meeting and the MDT team agreed that Student needed an FBA and that her behavior plan should be updated. Petitioner offered no evidence that Student's behavior plan was not updated as agreed at the meeting. I find, therefore, that Petitioner has not met his burden of proof on DCPS' alleged failure to appropriately address Student's absences in

the 2013-2014 school year.

For the 2014-2015 school year, there is a BIP in the record which was developed by the City High School social worker on September 30, 2014. This BIP was intended to target Student's oppositional defiant behaviors, such as refusing to follow directions, physical and verbal altercations and low self-esteem. However the September 30, 2014 BIP did not target or even reference Student's attendance issues. Periodically during the 2014-2015 school year, City High School staff attempted to contact Father, foster care providers and Student regarding Student's attendance. However, as of June 2, 2015, Student was present at City High School for only 62 out of 171 school days. I find that Petitioner has established that DCPS failed to ensure that appropriate behavior interventions were implemented in the 2014-2015 school year, reasonably calculated to address Student's persistent truancy and attendance issues, and that Student was denied a FAPE as a result.

D.

During the 2014-2015 school year, did DCPS fail to fully implement Student's Individualized Education Program by not providing all of the specialized instruction and related counseling services required by her IEP?

Petitioner also alleges that Student was not provided all of her IEP services, especially counseling in the 2014-2015 school year. The standard for failure-to-implement claims, used by the courts in this jurisdiction, was formulated by the Fifth Circuit Court of Appeals in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). This standard requires that a petitioner "must show more than a *de minimis* failure to implement all elements of [the student's] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial

or significant provisions of the IEP” in order to prevail on a failure-to- implement claim. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (Aug. 27, 2013) (quoting *Bobby R.*, 200 F.3d at 349). Courts applying this standard have focused on the proportion of services mandated to those actually provided, and the goal and import, as articulated in the IEP, of the specific service that was withheld. *Id.*

The only evidence offered to support Petitioner’s failure to implement claim was the testimony of Student, who claimed that the school social worker did not come to get her for her weekly counseling sessions. Student did not specify which weeks she did not receive counseling. However, Case Manager testified that in the 2014-2015 school year, Student was absent from school more than she was present and that she frequently missed her counseling sessions because she was absent. Student’s failure to attend school regularly in the 2014-2015 school year is, regrettably, well-documented and supports Case Manager’s testimony. I find that Petitioner has not established that Student’s not receiving her IEP counseling services was due to DCPS’ failure to implement her IEP.

E.

Is Student entitled to compensatory education for harm incurred from December 5, 2012 through October 2014 for DCPS’ failure to identify her as having an ED disability and failure to provide her appropriate services, programming and placement?

In the May 12, 2013 HOD, former Hearing Officer Massey concluded that DCPS had denied Student a FAPE by failing to collect the data necessary to determine whether she required the additional disability classification of ED and additional behavioral supports in her IEP. Hearing Officer Massey ordered, *inter alia*, that DCPS conduct a clinical assessment of Student sufficient to determine whether she should be classified

as ED and, if so, what support Student required to address her social/emotional needs. Hearing Officer Massey denied without prejudice Petitioner's request for compensatory education for DCPS' failure to provide programming for Student's alleged ED disability before the prior due process hearing. On June 17, 2013, DCPS School Psychologist completed a psychological reevaluation of Student and reported that Father's assessment of Student's emotional disturbance was not clinically significant and that a teacher's report of Student's behavior difficulties was not clinically significant. Student's MDT team met on September 27, 2013 and did not determine that Student had an ED disability or that her behavior supports should be increased.

The parent requested an IEE psychological reevaluation which Licensed Psychologist attempted beginning in October 2013. However, the IEE psychological was not completed until September 4, 2014 apparently because Student was not in her classes. On October 7, 2014, Student's IEP team reconvened to review the 2014 IEE psychological reevaluation. At that meeting, the IEP team agreed that Student had an ED disability, along with her ID disability. The IEP team revised Student's annual goals for her Emotional, Social and Behavioral Development area of concern, but left her Behavioral Support Services unchanged at four hours per month.

Petitioner requests that Student be awarded compensatory education for the failure of DCPS to identify her as a student with an ED from December 2012 to October 2014. If a student has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the

IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a child might have shown if she had received the required special education services and the type and amount of services that would place the child in the same position she 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.)

I find that Petitioner has not met his burden of proof to show that Student was denied a FAPE by not being identified as having an ED disability before October 2014. As explained above in this decision, the IDEA does not require that students be labeled with particular disabilities for purposes of service delivery. The student's eligibility team is charged with determining whether the student is a student with a disability and, if so, her needs for special education and related services. *See* 34 CFR § 300.306. Here Student's eligibility for special education and related services was never in dispute. Since at least December 5, 2012, Student's IEPs have provided for one hour per week of Behavioral Support Services and, since May 2013, full time full-time Specialized Instruction. Pursuant to the May 12, 2013 HOD, DCPS promptly had Student reevaluated by a DCPS school psychologist and the reevaluation did not support Student's identification as a student with an ED – as opposed to an ID – disability. After Licensed Psychologist completed her IEE psychological reevaluation report on September 4, 2014, Student's MDT team appropriately considered the additional data and determined that Student had an ED disability, in addition to her ID disability.

Neither the September 2014 IEE psychological reassessment, nor the MDT

team's recognition of Student's ED disability, resulted in a change in the amount of Student's special education services or her requirement for an outside of general education setting. Beginning in October 2014, Student was moved within City High School from the self-contained ID classroom to the self-contained ED classroom. However, there was no evidence that Student suffered a denial of education or received less educational benefit when she was assigned to the ID classroom. In fact, in May 2015, Student was returned to the ID classroom. In sum, Petitioner has not shown that Student suffered harm warranting compensatory education, due to DCPS' failure, prior to October 2014, to identify Student as having an ED disability.

Remedy

In this decision, I have found that DCPS denied Student a FAPE by not developing and implementing positive behavior interventions to target Student's school attendance issues in the 2014-2015 school year. Case Manager testified that because Student's attendance was "horrible," she did not make academic progress during the school year. I find that Student is entitled to an award of compensatory education for this failure of DCPS to appropriately address Student's persistent absences from school and her classes.

If a student has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir.2005) Licensed Psychologist proposed a compensatory education plan in this case for DCPS' not identifying Student as Emotionally Disturbed from December 2012 to October 2014. Assuming that Student had been improperly identified for a 13 school month period,

Licensed Psychologist recommended that Student be compensated with 152 hours of academic tutoring, which is some 11.7 hours of tutoring per month of harm. Although I concluded that DCPS' not identifying Student as ED prior to October 2014 was not a denial of FAPE, I will adopt Licensed Psychologist's analysis for determining the proper amount of compensatory education for the denial of FAPE I have found in this case. I have found that for the entire 2014-2015 school year, a period of approximately 9 months, DCPS failed to appropriately address Student's truancy and class attendance issues. Applying Licensed Psychologist's recommendation to award Student some 11.7 hours of tutoring for each month of harm, I will award Student as compensatory education, 105 hours of academic tutoring in Reading, Math and Writing.

Petitioner also requests that I order DCPS to fund Student's prospective placement at Nonpublic School for the 2015-2016 school year. In *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991), the D.C. Circuit Court of Appeals explained that "[i]f no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; 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." *Id.* at 305 (internal citations and quotations omitted). The appropriateness of an IEP or educational placement, "is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so." *See K.S. v. District of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citation omitted).

Here Petitioner has not shown that Student's lack of educational progress over the 2014-2015 school year was due to an inadequate IEP or to her placement in the full-

time, self-contained, classroom at City High School. To the contrary, the evidence established that when Student did attend school, she was able to do very well in this setting. Because Petitioner has not shown that Student's placement at City High School is not appropriate for her or not reasonably calculated to enable Student to receive educational benefits, I find that an award of private school placement is not warranted.

ORDER

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

ORDERED:

1. As compensatory education for the denial of FAPE in this case, DCPS' failure to ensure that appropriate interventions were put in place to address Student's school attendance during the 2014-2015 school year, DCPS shall provide Student 105 hours of one-on-one academic tutoring in such academic subjects, and on a schedule, as may be reasonably agreed upon between the parent and DCPS. DCPS may provide the tutoring services through a qualified DCPS employee or a private provider. The tutoring services must be used by the end of the 2015-2016 regular school year or shall be forfeited.
2. DCPS shall ensure that within 20 calendar days of the issuance of this decision, Student's IEP team is convened to develop an appropriate Behavior Intervention Plan (BIP) to provide positive behavioral interventions, supports, and other strategies, targeted to address Student's truancy and other school attendance issues. DCPS shall also ensure that if needed by the IEP team to formulate an appropriate BIP, an updated Functional Behavioral Assessment of Student is promptly conducted.
3. All other relief requested by the Petitioner herein is denied.

Date: August 11, 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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team