

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
August 5, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: August 4, 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 MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner contends that DCPS' April 22, 2014 Individualized Education Plan (IEP) places Student in an overly restrictive educational environment.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on May 22, 2014, named DCPS as respondent. The parties met

¹ Personal identification information is provided in Appendix A.

for a resolution session on June 11, 2014 and did not reach an agreement. On June 18, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on June 22, 2014.

The due process hearing was held before this Impartial Hearing Officer on July 22, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by CASE MANAGER and DCPS' COUNSEL.

Counsel for Petitioner made an opening argument. Petitioner testified and called as witnesses CLINICAL PSYCHOLOGIST and COMPENSATORY SERVICES PROVIDER. DCPS called as witnesses SOCIAL WORKER, Case Manager, CLASSROOM TEACHER, and ASSISTANT PRINCIPAL. Petitioner's Exhibits P-1 through P-31 were admitted into evidence with the exception of Exhibit P-29, to which DCPS' objection was sustained and Exhibits P-1, P-5, and pages 89, 92, 93 and 99 of Exhibit P-16, which were not offered. Respondent's Exhibit R-1 through R-20 was admitted into evidence without objection, except for Exhibit R-1 which was admitted over Petitioner's objection. Counsel for both parties made closing arguments. At the request of counsel for Petitioner, the parties were granted leave to file post hearing memoranda. Only Petitioner filed a post-hearing brief.

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 July 10, 2014 Revised

Prehearing Order:

- I. Whether DCPS denied the student a free appropriate public education (FAPE) by failing to create an appropriate IEP on March 12, 2014, specifically by reducing the hours of specialized instruction inside general education based on the services available at the school and on April 24, 2014 by developing an overly restrictive IEP with 26 hours per week of Specialized Instruction outside general education;
2. Whether DCPS denied the student a FAPE by failing to determine an appropriate placement consistent with the least restrictive environment (LRE) mandates of the IDEA by developing an overly restrictive IEP on April 24, 2014 resulting in all services to be delivered outside general education;
3. Whether DCPS denied the student a FAPE by failing to include the parent in the decision making process regarding the assignment of the student to CITY SCHOOL 2; and
4. Whether DCPS denied the student a FAPE by failing to implement the student's specialized instruction and behavioral support services from August 2013 through June 2014.

For relief, Petitioner requests that DCPS be ordered to develop an appropriate IEP, inclusive of specialized instruction inside general education and the provision of a behavioral support aide; and that DCPS be ordered to place the student in her neighborhood school, CITY MIDDLE SCHOOL. In addition Petitioner seeks an award of compensatory education services for the denials of FAPE proven in this case, including academic tutoring and behavioral support.

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 with Mother in the District of Columbia.

Testimony of Mother.

2. Student is a “child with a disability” as defined by the IDEA and eligible for special education and related services under the primary disability classification Emotional Disturbance (ED). Exhibit P-4. Student has been diagnosed with bipolar disorder. She is medicated for the condition and receives outside-school counseling. Testimony of Mother.

3. In 2008, Student was found eligible for special education services as a student with a Specific Learning Disability (SLD). Exhibit P-26.

4. For the 2013-2014 School Year, Student was enrolled in GRADE at City Middle School, Student’s neighborhood school. Student previously attended PUBLIC CHARTER SCHOOL. At Public Charter School, Student had an IEP which provided for 15 hours per week of Specialized Instruction in the general education setting and two hours per week of pull-out services. Mother thought that the Public Charter School IEP worked great for Student. Student had fewer incidents with other children and no issues with school staff. Testimony of Mother.

5. From the beginning of the 2013-2014 school year at City Middle School, Student had behavior issues. In the first week of school, she was “unofficially” suspended. Testimony of Mother. Student was suspended out-of-school from September 23, 2013 through October 2, 2013, after she allegedly was observed hitting another student in the head, repeatedly, with close fists. Exhibits R-10, R-15.

6. On October 9, 2014, Student was referred by District police to PSYCHIATRIC HOSPITAL after allegedly taking a large rock to school with the intent to harm another student. During this in-school incident, Student allegedly expressed suicidal and homicidal ideations. Exhibit R-15. Student was admitted for 7-10 days at Psychiatric Hospital. Testimony of Mother.

7. Following an incident at City Middle School on or about November 13, 2013, when Student allegedly punched a teacher in the face, knocking her glasses off, the school principal proposed suspending Student out-of-school for 45 days. Mother was informed that due to the emergency conditions of the incident, Student would not be allowed to return to school until the DCPS Instructional Superintendent reviewed the proposed discipline. Mother was instructed, in the interim, to pick up an Educational Plan for Student to make up class assignments, homework and exams. Exhibit P-23. On December 4, 2013, Mother was informed by DCPS that the proposed long-term discipline was approved upon review and that Student was assigned to ALTERNATIVE SCHOOL for the duration of her suspension. Exhibit R-15.

8. Student was placed at Alternative School from December 5, 2013 through January 31, 2014. Testimony of Mother. When Mother met with the staff at Alternative School, she was informed that the school did not provide Specialized Instruction. Student was told to stay home from Alternative School for the last week of her suspension, after she allegedly verbally assaulted another Alternative School student. Student returned to classes at City Middle School on February 2, 2014. Testimony of Mother.

9. At Alternative School, for the 2nd Advisory Period ending on January 24, 2014, Student received a B in English, C's in World History and Health/Physical Education and AUD (ungraded) in mathematics. Exhibit P-21.

10. On March 10, 2014, Student was referred to the City Middle School office for discipline after allegedly telling another student that she would kill her father and that she was going to beat the s*** out of the other student. Exhibit R-15.

11. On March 15, 2014, Student was referred to the school office for discipline

after she allegedly refused to stop smacking other students on their behinds. Exhibit R-15.

12. On April 4, 2014, there was a major incident at school. Student allegedly got into a fight with another student in Spanish class. The fight escalated. After help was obtained, Student was escorted to the administration office and then to the school nurse for attention to her bleeding face. Student allegedly attempted to knock over the refrigerator in the nurse's office and then went into the hall and kicked a glass trophy closet and stormed outside. Outside the school, she allegedly threatened to blow up the school and then, when she was not able to reenter, knocked over a flower pot. District police were summoned and Student was transported to CITY HOSPITAL. Exhibit R-15. The City Middle School principal determined that Student was responsible for the incident and proposed that she be suspended, off site, for 45 days. Exhibit P-24. A Manifestation Determination Review meeting was convened and Student's behavior was determined to be a manifestation of her IDEA disability. Testimony of Mother.

13. DCPS SCHOOL PSYCHOLOGIST conducted a psychological reevaluation of Student in December 2013. She had been referred for a reevaluation by her mother, in conjunction with the Multidisciplinary Team (MDT) at City Middle School, as part of data for consideration to determine whether Student's disability classification should be changed from SLD to ED. School Psychologist administered a battery of cognitive, educational and behavioral assessments, made classroom observations and interviewed Student, her Mother and a teacher. Exhibit P-26.

14. In her December 30, 2013 report, School Psychologist reported that Student's intellectual functioning tested in the average range. Her educational achievement level, as measured by the Woodcock-Johnson III Tests of Achievement (W-

J III) indicated some weaknesses. Her Broad Reading standard score fell in the Low range. Her Broad Math standard score fell in the Low range. Her Broad Written Language score fell in the Low average range. Exhibit P-26.

15. For the December 2013 psychological evaluation, Teacher completed the Behavior Assessment System for Children, Second Edition, (BASC-2) questionnaires, designed to be an observational inventory to help evaluate personality and behavior problems and emotional disturbance in the school setting. Based on the Teacher's rating. Student's scores were in the Clinically Significant range for Externalizing Problems, Hyperactivity, and Internalizing problems. Scores for School Problems, Attention Problems and Learning Problems fell in the At-Risk classification range. Student's score of 106 for Aggression was far above average and was Clinically Significant. Her Depression and Withdrawal Indices also indicated Clinical Significance. Her score for Anxiety was Average. The teacher reported that Student engaged in a high number of behaviors that were adversely affecting other children in the classroom. Exhibit P-26.

16. Mother completed the Conners 3rd Edition - Parent Response Booklet (Conners -3) and the Scales for Assessing Emotional Disturbance Second Edition (SAED2). Mother's responses on the Conners-3 reflected "Indicated" areas of concern including inattention, hyperactivity/impulsivity, Defiance/Aggression, Peer Relations, and Learning Problems. On the SAED2, Mother endorsed Student's characteristics of Relationship Problems and Physical Symptoms that were Highly Indicative of ED. Her responses also endorsed characteristics of Inappropriate Behavior, and Unhappiness or Depression which were also Indicative of ED. Exhibit P-26.

17. School Psychologist concluded that based on her cognitive abilities,

achievement scores, and behavior history, Student met the criteria for ED as her primary disability. School Psychologist stated that Student had demonstrated, based on her ongoing behavior concerns and minimal academic progress, that she required a high level of individualized attention and assistance. School Psychologist recommended a full-time specialized program for Student with a high level of structure and supervision. Exhibit P-26.

18. At an MDT meeting on February 6, 2014, School Psychologist reviewed her psychological evaluation of Student. The MDT team determined that Student no longer met criteria for SLD and met criteria for ED. The team agreed to refer Student to the DCPS Least Restrictive Environment (LRE) team. Exhibit R-8.

19. Student's IEP team made a referral to DCPS recommending a new placement for Student that would address her behavioral and emotional needs. DCPS LRE OBSERVER made an observation of Student on February 20, 2014 in two classes at City Middle School. LRE Observer reported that Mother shared the school's concerns about Student and had stated that she believed Student was in need of a therapeutic environment. She observed that Student's behavior in class was inappropriate and she was not engaged in her lessons, that she talked during the entire class periods and there were not consequences or rewards to address her behaviors. Based upon documents reviewed and her observations, LRE Observer concluded that Student was in need of individualized accommodations and modifications to assist her with sustaining attention and completing assignments. She recommended that Student may benefit from a more restrictive school environment that meets her academic and social-emotional needs, with the caveat that DCPS needed to obtain additional documentation and review the case further. Exhibit R-7.

20. On February 6, 2014, City Middle School developed a Behavior Intervention Plan (BIP) for Student to address her fighting and pre-fighting behaviors, including being physically and verbally aggressive and passively aggressive. The BIP provided teachers a series of progressive steps to attempt to manage Student's in-class behaviors before they became unmanageable. The BIP included a crisis intervention plan and also provided rewards and reinforcements to promote pro-social behaviors. Exhibit P-25.

21. Student's City Middle School IEP team convened on March 12, 2014 for an Annual Review meeting. Mother and her former attorney attended the meeting. Exhibit R-6. The IEP team discussed the results of the DCPS LRE observation. The school representatives believed Student needed to be in a behavior support classroom, with behavior support staff, in a therapeutic support program and that Student should be in a smaller classroom. Mother and her attorney thought more documentation should be obtained before placing Student in a more restrictive environment. The IEP team agreed to reconvene after the DCPS spring break. Testimony of Case Manager.

22. At the March 12, 2014 meeting, the IEP team revised Student's IEP to provide her 7.5 hours per week of Specialized Instruction inside the general education setting and 5 hours per week outside general education. The March 12, 2014 IEP also provided Student 240 minutes per month of Behavioral Support Services. Exhibit P-8. This reduction in Specialized Instruction services from Student's March 19, 2013 PCS IEP was made because this was the maximum hours of services that City Middle School was able to implement in the general education setting. Testimony of Case Manager.

23. Student's IEP team reconvened on April 22, 2014. Mother and her former attorney attended the meeting. The school representatives decided to increase Student's

Specialized Instruction to 26 hours per week, all outside general education, and that Student needed to be in a more restrictive environment. Mother disagreed because she contended that City Middle School had not faithfully implemented Student's prior IEPs and she did not want Student to be moved so close to the end of the school year.

Exhibits P-4, R-5. Overriding Mother's disagreement, the IEP team changed Student's IEP service to full-time, which could not be implemented at City Middle School. Exhibit R-4.

24. On May 7, 2014, DCPS notified Mother in writing that Student's new location of services would be CITY SCHOOL 2. Exhibit R-3. At an MDT meeting on May 14, 2014 at City Middle School, the City School 2 principal advised that City School 2's self-contained academic and behavioral program was in a separate building space from its regular high school program. There would be eight students in the program, staffed by a teacher and an aide. Support for students from the school dean and a behavior tech would be available throughout the school day. Exhibit R-2.

25. After the May 7, 2014 MDT meeting, Mother visited the program proposed for Student at City School 2 and met with the special education coordinator there. Subsequently, at the June 11, 2014 Resolution Session meeting for this case, Mother agreed, under duress, for Student to enroll in the City School 2 program. Notwithstanding, Mother has continued to object to the program as overly restrictive. Testimony of Mother.

26. During the 2013-2014 school year, School Social Worker was the provider for the one hour per week of Behavioral Support services required by Student's IEP. She first provided counseling services to Student on September 10, 2013. She provided three hours of services in September 2013, two hours of services in October 2013, one hour of

services in November 2013, no services in December 2013, two hours of services in January 2014, two hours of services in February 2014, three hours of services in March 2014, four hours of services in April 2014, and three hours of services in May 2014. After May 19, 2014, Student refused counseling services from Social Worker. Except for one session in February 2014, when Social Worker was unavailable, Social Worker always provided the IEP specified counseling services to Student, unless school was closed, or Student was unavailable or refused services. Exhibit R-13, Testimony of Social Worker.

27. When Student's behaviors escalated and she needed a break from the classroom, she went to Case Manager or School Psychologist for one-on-one support. This happened on a daily basis. Testimony of Case Manager.

28. Student remained at City Middle School for the rest of the 2013-2014 school year. Her final grades were D+ in Science, C in Mathematics, B in Humanities and F in Spanish. Exhibit P-14.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and 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, § 3030.3. *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

1. Did DCPS deny the student FAPE by failing to create an appropriate IEP on March 12, 2014, specifically by reducing the hours of specialized instruction inside general education based on the services available at the school and on April 24, 2014 by developing an overly restrictive IEP with 26 hours per week of specialized instruction outside general education?
2. Did DCPS deny the student FAPE by failing to determine an appropriate placement, consistent with the LRE mandates of the IDEA, by developing an overly restrictive IEP on April 24, 2014 resulting in all services to be delivered outside general education?

Student's March 21, 2013 Public Charter School IEP provided her 15 hours per week of Specialized Instruction in the general education session and two hours per week outside general education. The City Middle School March 12, 2014 IEP reduced Student's Specialized Instruction in general education to 7.5 hours a week because that was the maximum City Middle School could provide. In the April 24, 2014 IEP, the City Middle School IEP team changed Student's placement, from all but five hours per week in the general education setting, to full-time Specialized Instruction outside general education. The principal dispute between Mother and DCPS in this case is whether DCPS violated the IDEA's least restrictive environment (LRE) requirement by changing Student's placement to the full-time, self-contained, special education program at City School 2.

An IEP is the vehicle used by an IEP team to assess a student's needs and assign a commensurate learning environment. *See, e.g., Gill v. District of Columbia*, 751 F.Supp.2d 104, 108 (D.D.C.2010). The IEP team examines the student's educational history, progress, recent evaluations, and parental concerns prior to implementing a FAPE for the student. *Id.* At a minimum, the IEP and the corresponding FAPE must "provid[e] personalized instruction with sufficient support services to permit the child

to benefit educationally from that instruction.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The IDEA requires districts to (1) provide each disabled child within its jurisdictional boundaries with a FAPE tailored to his or her unique needs, and (2) assure that such education is offered, to the greatest extent possible, in the educational “mainstream,” that is, side by side with non-disabled children, in the least restrictive environment consistent with the disabled student’s needs. *See Estate of Lance v. Lewisville Independent School Dist.*, 743 F.3d 982, 989 (5th Cir.2014). The Act “requires school districts to place disabled children in the least restrictive environment possible. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006).” *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C.2006) (citations omitted). “Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the [IDEA].” *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir.1989). However, mainstreaming is not proper for every disabled child. *Id.* The key consideration is whether a proposed placement is appropriate under the IDEA. *Id.*” *Schoenbach v. District of Columbia*, 2006 WL 1663426, 7 (D.D.C. Jun. 12, 2006).

Counsel have not cited, nor have I found, an explicit test used by the courts in this jurisdiction to determine whether a contested IEP places a student in the least restrictive environment. Therefore, I will apply the test announced in *Oberti v. Clementon Sch. Dist.*, 995 F.2d 1204, 1215 (3rd Cir.1993), versions of which have been adopted by the U.S. Courts of Appeals in at least six circuits. *See P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Ed.*, 546 F.3d 111, 119 (2nd Cir. 2008) (adopting *Oberti* test and

citing decisions from sister circuits.) Under the two-part *Oberti* test, “first, the Court must determine ‘whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.’ *Oberti*, 995 F.2d at 1215. Factors the Court should consider in applying this prong are: (1) the steps the school district has taken to accommodate the child in a regular classroom; (2) the child’s ability to receive an educational benefit from regular education; and (3) the effect the disabled child’s presence has on the regular classroom. *See id.* at 1215–17. Second, if the Court finds that placement outside of a regular classroom is necessary for the child’s educational benefit, it must evaluate ‘whether the school has mainstreamed the child to the maximum extent appropriate, *i.e.*, whether the school has made efforts to include the child in school programs with nondisabled children whenever possible.’ *Id.* at 1215.” *T.R. v. Kingwood Tp. Bd. of Educ.*, 205 F.3d 572, 579 (3rd Cir.2000).

i. Steps taken by DCPS to Accommodate Student in Regular Education

As the *Oberti* court observed, the IDEA and its regulations do not contemplate an all-or-nothing educational system in which a student with a disability attends either regular or special education. The IDEA requires that before placing a child in a self-contained special education program, “the school must take intermediate steps wherever appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops.” *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1050 (5th Cir.1989).

In this case, I find that Petitioner has established that DCPS made insufficient

effort to accommodate Student in general education before changing her placement to the full-time special education program at City School 2. During the 2012-2013 school year, Student was able to be educated satisfactorily in a mainstream classroom at Public Charter School with 15 hours per week of push-in Specialized Instruction services and only two hours per week of pull-out services. Parent's expert, Clinical Psychologist, opined that Student can be successful with a fully implemented IEP, push-in special education and a "behavior support aide," who could be with Student in school all day and help to keep her safe. I discount Clinical Psychologist's opinion because she has not observed Student at school or communicated with her teachers or behavioral services providers. However, Case Manager, who has worked closely with Student, also testified that if a teacher worked with Student one-on-one, she was able to do the work, but that Student needed constant attention, encouragement, and someone to talk with her and process with her on her negative behaviors.

Under the IDEA's LRE requirement, DCPS was required to take "intermediate steps" before changing Student's placement to a full-time self-contained special education program. Prior to adopting the April 22, 2014 IEP, the City Middle School IEP team had only offered Student, in the March 12, 2014 IEP, 7.5 hours per week of Specialized Instruction in the general education setting because that was all that City Middle School could provide. The IEP team did not offer Student a paraprofessional aide to assist in providing special education services in the classroom or any other intermediate steps to enable Student to remain in the educational mainstream. Case Manager opined that a dedicated aide might not benefit Student, because having an aide would make Student "stand out" and because the paraprofessional might not be able to provide Student the behavioral or therapeutic support she needs. These concerns,

however, are speculative and do not justify DCPS' not attempting this service before removing Student from the general education mainstream. I conclude that DCPS' steps to accommodate Student in the regular education setting in this case were not adequate.

ii. Student's Ability to Receive an Educational Benefit from Regular Education

The evidence in this case establishes that Student is able to receive educational benefit from the regular education setting. As noted above, prior to enrolling at City Middle School for the 2013-2014 school year, Student was able to be educated satisfactorily in a mainstream classroom at Public Charter School, with 15 hours per week of push-in Specialized Instruction services and only two hours per week of pull-out services. Case Manager, who worked very closely with Student at City Middle School, agreed that she was able to make educational progress when she was focused. Despite numerous behavioral issues, including a long-term suspension and interim placement at Alternative School, Student was promoted at the end of the 2013-2014 school year, having passed all of her courses except for Spanish. I find that this evidence establishes that with appropriate supplementary aids and services, Student is able to receive educational benefit from the regular education setting.

iii. The Effect Student's Presence Has on the Regular Classroom.

When Student was placed in a regular classroom over the 2013-2014 school year at City Middle School, she exhibited disruptive and often dangerous behaviors which were a threat to her own safety and to that of other students and staff. These occurrences allegedly included hitting another student (September 2013), taking a large rock to school with the intent to harm another student and expressing suicidal and homicidal ideations (October 2013), punching a teacher in the face (November 2013),

telling another student that she would kill her father and that she was going to beat the s*** out of her (March 2014), refusing to stop smacking other students on their behinds (March 2014) and provoking a fight with another student and damaging school property (April 2014). Student's presence in the regular classroom undoubtedly had a negative effect.

Under the IDEA, a student may be removed from the regular classroom if it is necessary for the safety of other students or for the disabled child. *M.M. v. District 0001 Lancaster County School*, 702 F.3d 479, 485 (8th Cir.2012), citing 20 U.S.C. § 1412(a)(5); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 n.4, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). However, before removing the student, the Act requires that the school district take intermediate steps, wherever appropriate, to accommodate the student in the general education setting. Here, Mother argues that before moving Student from the general education classroom setting to the much more restrictive environment at City School 2, DCPS was obliged to consider and attempt less restrictive alternatives. I agree. The facts in this case are analogous to those in *Corpus Christi Independent School Dist. v. Christopher N.*, 2006 WL 870739, 5 (S.D.Tex.2006). In *Christopher N.*, the student had severe behavior problems. The parents believed that their son could only receive an appropriate education in residential treatment, while the school district proposed a one-on-one aide with counseling and other services within the public school. Overturning the hearing officer, who found for the parents, the Court, citing *Daniel R.R., supra*, held that the school district did exactly what it was required to do: propose intermediate changes to the student's IEP that provided maximum exposure and interaction with nondisabled students. *See Christopher N., supra*. In this case, DCPS not only did not propose intermediate IEP changes to enable Student to remain in the

mainstream setting, at the March 12, 2014 IEP meeting, the IEP team halved Student's in-class Specialized Instruction services from 15 to 7.5 hours per week.

In sum, I find that the Petitioner has established it is probable that Student's education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. Therefore DCPS' failure to propose intermediate steps, including, but not limited to providing Student a dedicated aide in the general education classroom, before changing her placement to a full-time self-contained program at City School 2, violated the IDEA's LRE requirement and resulted in denial of FAPE. Having found that Student's education in the regular classroom, with the use of supplementary aids and services, can likely be achieved satisfactorily, I do not reach the second prong of the *Oberti* test. See *T.R., supra*, 205 F.3d at 579.

I also find that City Middle School's March 12, 2014 IEP, which reduced Student's Specialized Instruction services in general education from 15 hours per week to 7.5 hours per week – because that was all of that City Middle School was able to provide – violated the IDEA. See, e.g., *Pinto v. District of Columbia*, 938 F.Supp.2d 25, 30 (D.D.C.2013) (IEP must be “tailored to the unique needs” of each child;) Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46588 (August 14, 2006) (Placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as availability of special education and related services.) However, the evidence does not establish that the March 12, 2014 IEP was ever implemented, because the IEP team agreed to meet again after the DCPS spring break.

3. Did DCPS deny the student a FAPE by failing to include the parent in the decision making process regarding the assignment of the student to City School 2?

Petitioner contends that DCPS denied Student a FAPE by not including her in the decision making process to assign Student to City School 2. The IDEA 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. It appears to be unsettled in this jurisdiction whether DCPS’ delegation of site selection to its Location of Services (LOS) team 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.) *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 not necessary to decide in this case whether DCPS’ delegation of site selection to its LOS team is permitted by the IDEA, because I find that Mother was involved in the City School 2 placement decision for Student. DCPS notified Mother on May 7, 2014 that the new location of services for Student would be City School 2. Mother attended a May 14, 2014 MDT meeting where the principal of City School 2 described the program. Mother stated at the meeting that the program sounded too restrictive and requested to visit the school. After the meeting, Mother visited the

school and spoke to the LEA Representative there. At the June 11, 1014 resolution session meeting in this case, Mother agreed “under duress” that Student would go to City School 2. Although Mother continued to object to the City School 2 location for Student and DCPS refused to change it, I find that DCPS complied with the IDEA’s requirement to involve the parent in this placement decision. *Cf. T.Y., supra*, 584 F.3d at 420 (“The parents’ actions suggest that they seek a “veto” over school choice, rather than “input”—a power the IDEA clearly does not grant them.” *Id.*)

4. Did DCPS deny Student a FAPE by failing to implement Student’s specialized instruction and behavioral support services from August 2013 through June 2014?

Petitioner contends that in the 2013-2014 school year, DCPS failed to implement Student’s IEP by failing to provide the specified Behavioral Support Services, by failing to provide Specialized Instruction services during the period of Student’s interim placement following her November 2013 suspension from City Middle School, and by failing to fully implement Student’s February 6, 2014 BIP. *See* Petitioner’s Post Hearing Brief. DCPS denies that it failed to implement Student’s IEP.

The IDEA is violated when a school district deviates materially from a student’s IEP. *See Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). A petitioner “must show more than a *de minimis* failure to implement all elements of [the student’s] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP in order to prevail on a failure-to-implement claim. Courts applying this standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *See Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C.2013) (citations and

internal quotations omitted.) Applying the *Bobby R.* standard, I will address each of Petitioner's failure-to-implement claims in turn.

i. Behavioral Support Services

Student's IEPs for the 2013-2014 school year provided that she would receive one hour per week of Behavioral Support Services. School Social Worker testified that she provided Behavioral Support counseling services to Student, except when Student was unavailable. The Behavioral Support Service Trackers reflect that Social Worker first provided counseling services to Student on September 10, 2013. Thereafter, except for one missed week in February 2014, she provided weekly counseling services to Student when Student was in the school building, except when Student refused the services. Student also received one-on-one behavioral support from School Psychologist and Case Manager as needed, which occurred on a daily basis. I conclude that Petitioner has not established that DCPS failed to implement substantial portions of the Behavior Support Services requirement of Student's IEP.

ii. Specialized Instruction Services during Suspension

Petitioner contends that DCPS failed to provide Student her IEP Specialized Instruction Services during the period of her long-term suspension from November 13, 2013 through the end of January 2014. Immediately after the November 13, 2013 incident, Mother was instructed to pick up an Educational Plan for Student to make up class assignments, homework and exams. On December 4, 2013, Mother was informed by DCPS that the proposed long-term discipline was approved upon review and that Student was assigned to Alternative School as her alternative educational setting. See 34 CFR § 300.530(d). In its interpretation of the IDEA's disciplinary provisions, the U.S. Department of Education has explained that a school district is not required to

continue to implement a child's IEP during a long-term removal, provided that the child is provided services to enable her to continue to participate in the general curriculum, and to progress toward meeting the goals set out in her IEP:

In other words, while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.

Assistance to States for the Education of Children with Disabilities, supra, 71 Fed. Reg. at 46716. Student received passing grades for the 2nd Advisory Period while she attended Alternative School. Although Mother testified to her understanding that Alternative School did not have a math teacher and did not provide Specialized Instruction, the evidence did not establish that Student did not receive sufficient services during the long-term suspension to enable her to continue to participate in the general curriculum and to progress toward the goals in her IEP.

iii. Implementation of February 6, 2014 Behavior Intervention Plan

Student's February 6, 2013 Behavior Intervention Plan (BIP) at City Middle School provided interventions to address Student's "Fighting behavior" and "Pre-Fighting Behavior," including rewards such as computer time and positive feedback for pro-social behavior, and consequences – discipline, timeouts, breaks, cool down periods – for target behaviors, as well as a crisis intervention plan. Petitioner contends that the BIP was not implemented, based on the report of LRE Observer that she did not observe

any rewards or consequences in place to address Student's behaviors in the two classes she observed on February 20, 2014. However, Case Manager testified that she distributed the BIP to Student's teachers and the teachers reported that they implemented the plan. I find that Petitioner has not met her burden of proof on this issue. Also, Petitioner contends that the City Middle School staff failed to follow the BIP crisis intervention plan guidance when they responded to the April 4, 2014 fighting incident, apparently because the teacher ran out of the room instead of remaining calm and asking the participants to stop. This Hearing Officer will not second guess the school staff's response to the April 4, 2014 emergency situation and I do not find that the staff's actions were inappropriate or demonstrated that the school failed to implement substantial or significant provisions of Student's BIP. I conclude that Petitioner has not shown that City Middle School failed to implement substantial or significant provisions of Student's IEP or BIP.

Summary

In this decision, I have found that Student was denied a FAPE by DCPS' April 22, 2014 IEP, which changed her placement from services in a mostly mainstream setting to a full-time self-contained behavior program at City School 2 – without first proposing intermediate changes to Student's IEP to enable Student to remain in classes with her nondisabled peers. Upon Mother's objection to the change in placement, DCPS allowed Student to remain at City Middle School for the remainder of the 2013-2014 school year. Petitioner has, therefore, not established any educational harm to Student resulting from the inappropriate IEP. To remediate this violation of the IDEA, I will order DCPS to reconvene Student's IEP team to review and revise her IEP, as appropriate, including to provide her a dedicated aide in the general education setting. I have further found

that DCPS' March 12, 2014 IEP was not calculated to meet Student's unique needs. However that IEP was replaced some 20 school days later by the April 22, 2014 IEP and there was no evidence that Student suffered educational harm in the interim. Finally, I find that Petitioner has not met her burden of proof with respect to her claims of failure to implement Student's IEP and BIP and failure to include Petitioner in the decision making process regarding the assignment of Student to City School 2. Petitioner has therefore not established any basis for her requested compensatory education remedy. *See Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C.Cir.2005) (Finding a denial of FAPE is a necessary prerequisite to a compensatory education award.)

ORDER

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

ORDERED:

1. Within 10 business days of the entry of this order, DCPS shall reconvene Student's IEP to revise her IEP in accordance with this decision. The revised IEP shall provide intermediate steps, including but not limited to the provision of a dedicated aide, calculated to enable Student to be educated, to the maximum extent appropriate, with students who are nondisabled. This order shall not preclude DCPS from changing Student's location of services if City Middle School is not able to implement the revised IEP, providing that the parent is involved in any placement or location decision, and shall not bar DCPS from hereafter removing Student from the regular education environment if it is determined that the intermediate steps are unsuccessful and the nature or severity of Student's disability is such that her education in regular classes, even with the use of supplementary aids and services, cannot be achieved satisfactorily; and
2. All other relief requested by Petitioner herein is denied.

Date: August 4, 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).