

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 11, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: August 10, 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 Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools' (DCPS) inappropriate November 7, 2013 Individualized Education Plan (IEP) and by a failure to implement the IEP.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 6, 2014, named DCPS as Respondent and alleged both discipline issues and non-discipline education issues. On June 16, 2014, DCPS filed a motion to dismiss the discipline issues asserted in the due process complaint. The parties met for a resolution session on June 19, 2014. Subsequent to the resolution session meeting, the parties reached a settlement on the discipline issues. On June 20, 2014 and July 11, 2014, I convened telephone prehearing conferences with counsel to discuss the hearing date, the remaining issues to be determined and other matters. The 45-day period for issuance of this decision began on July 7, 2014.

The due process hearing was held before this Impartial Hearing Officer on July 31, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for both parties made opening and closing statements. Petitioner testified and called NONPUBLIC SCHOOL DIRECTOR and SERVICE PROVIDER as witnesses. DCPS made an oral motion for a directed finding at the conclusion of Petitioner's case-in-chief, which I granted in part and denied in part. DCPS called SPECIAL EDUCATION TEACHER as its only witness.² Petitioner's Exhibits P-1 through P-16 and Respondent's Exhibits R-1 through R-8 were admitted into evidence without objection. Neither party requested leave to file a post-hearing memorandum.

² DCPS also sought to have SOCIAL WORKER testify by telephone. Petitioner objected to Social Worker's testifying by telephone because the witness did not have access to the hearing exhibits. I sustained Petitioner's objection.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

The following issues for determination were certified in the July 4, 2014

Prehearing Order, as supplemented by a July 18, 2014 email from Petitioner's Counsel:

1. Whether DCPS' November 7, 2013 IEP is inappropriate because it fails to include a disability classification for Emotional Disturbance (ED), because it states incorrectly that Student's behavior does not impede his learning or that of other students, because the IEP annual goals are inappropriate, because the Behavioral Support related services are not appropriate because the hours per month are insufficient and not all counseling is specified to be on individual basis and because the IEP does not provide for Student's placement in a special therapeutic day school;
2. Whether DCPS has denied the student FAPE by failing to identify and place the student at an appropriate educational placement that can meet his academic and emotional-behavioral needs for school year 2014-2015;
3. Whether DCPS has denied Student FAPE by failing to update his Behavior Intervention Plan (BIP) since December 2012;
4. Whether DCPS has denied the student FAPE by failing to provide the parent requested access to Student's education records;
5. Whether DCPS denied Student a FAPE by failing to implement the Behavioral Support Services provisions in the November 7, 2013 IEP;
6. Whether DCPS denied Student a FAPE by failing to test him at regular intervals to determine his academic progress and modify programs if adequate progress is not made, as required in the IEP;
7. Whether DCPS denied Student a FAPE by failing to provide specialized instruction as required by the IEP, because there was no scientifically motivated reading program used to implement the goals and objectives as written; and
8. Whether DCPS denied Student a FAPE by failing to gather anecdotal data and maintain records of programs utilized and student response to interventions utilized in order to determine progress.

For relief, Petitioner seeks an order for DCPS to fund Student's prospective placement at Nonpublic School; an order for DCPS to convene an IEP team meeting to revise and update Student's IEP and BIP; and an order for DCPS to immediately provide to Petitioner's Counsel all education records concerning Student in possession of DCPS, including Special Education Data System (SEDS) documents. In addition, Petitioner seeks a compensatory education award for alleged denials of FAPE.

In response to DCPS' motion for a directed verdict following presentation of Petitioner's case-in-chief, Petitioner's counsel conceded that Petitioner had adduced no evidence supporting her claim that DCPS had not afforded her access to Student's education records. *See* 34 CFR §§ 300.501 (a), 300.613(a). I granted DCPS' motion to dismiss Petitioner's access to education records claim (Claim 4). Otherwise, I denied DCPS' motion.

FINDINGS OF FACT

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

1. Student, an AGE youth, resides with Mother in the District of Columbia. Testimony of Mother. Student is a "child with a disability" as defined by the IDEA and is eligible for special education and related services under the primary disability classification Specific Learning Disability (SLD). Exhibit P-11.
2. For the 2013-2014 school year, Student was enrolled in GRADE at CITY MIDDLE SCHOOL 1. He attended City Middle School 1 for the 2011-2012 school year, started the 2012-2013 school year at City Middle School 2 and returned to City Middle School 1 for the second part of the 2012-2013 school year. Testimony of Mother.
3. Student's December 18, 2012 IEP, developed at City Middle School 2,

provided annual goals in Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. The 2012 IEP provided Student 25 hours per week of Specialized Instruction outside general education and 180 minutes per month of Behavioral Support services. Exhibit P-8.

4. A DCPS social worker conducted a Functional Behavioral Assessment (FBA) of Student in December 2012. Student's behavior problems were described as not entering the building when dropped off at school, refusing to enter the classroom and attend class, and, when in the classroom, struggling to stay on task and completing school work. The functions of Student's behaviors were described as multifaceted and serving the need for Student to get what he wants, seek attention and avoid schoolwork. Student was also described as appearing to experience severe anxiety throughout the school day resulting in his behaviors of concern. Exhibit P-6.

5. The City Middle School 2 IEP team adopted a Behavior Intervention Plan (BIP) for Student dated December 18, 2012. The BIP focuses on increasing communication with staff, weekly counseling, personal goal setting, clear and concise directions, implementation of a behavior tracker, and positive reinforcements and rewards for appropriate behaviors. Exhibit P-5. Student returned to City Middle School 1 in the middle of the 2012-2013 school year. Testimony of Mother. The hearing evidence does not establish whether the December 18, 2012 BIP was effective in supporting the goals and objectives of Student's IEP over the rest of the 2012-2013 school year.

6. For the 2013-2014 school year, Student was placed in the Behavior Education Support (BES) Program at City Middle School 1. In Student's BES Program classroom there were eight students, staffed by a special education teacher and a

behavior tech. There were also two dedicated aides assigned to other students in the class. The BES program uses an incentive program for students to earn points for desired behaviors. Testimony of Special Education Teacher.

7. At the beginning of the 2013-2014 school year, Mother spoke to City Middle School 1 SPECIAL EDUCATION COORDINATOR (SEC) and expressed concerns about addressing proactively Student's school behavior issues. Mother told SEC that she did not want to "play games." SEC told Mother that Student had been placed in a restrictive setting and said "Let's see how it goes." Testimony of Mother.

8. At the beginning of the 2013-2014 school year, Student would just sit in the classroom and not do work. He would not read. By the end of the school year, Student was working and he was reading, although he still had fluency issues. At the beginning of the school year, Student could only write 3-4 sentences. By the end of the school year, he could write a whole page, respond to prompts and organize his thoughts and put them on paper. Mathematics was Student's strength and he seldom used a calculator. In January 2013, the BES classroom got the READ 180 literacy program. Student advanced to higher levels in the READ 180 program and liked it. Testimony of Special Education Teacher.

9. Student's grades improved over the 2013-2014 school years in all courses except Character Development. His grade in English improved from F (Term 1) to C+ (Term 4), in Math from F (Term 1) to B (Term 4), in Science from F (Term 1) to C (Term 4). In Character Development, his grade fell from B (Term 1) to D (Term 4). Exhibit R-8.

10. After the November 7, 2013 IEP meeting, Student was provided counseling services in four sessions in November 2013, three sessions in December 2013, four

sessions in January 2014, four sessions in February 2014, four sessions in March 2014, three sessions in April 2014 and three sessions in May 2014. Student did not receive counseling services after May 13, 2014 because he was serving a long-term out of school suspension. Exhibit R-1.

11. At the end of the 2013-2014 school year, Student become more defiant asserting he was not going to work because he would not pass anyway. Special Education Teacher had to reassure Student about his progress. Testimony of Special Education Teacher.

12. By September 2013, Mother had received a few telephone calls from City Middle School 1 about behavior incidents involving Student. Mother told the school she wanted to come up with a placement for Student that worked and requested a meeting. Mother's meeting request was "brushed aside."³ Testimony of Mother.

13. City Middle School 1 scheduled Student's Multidisciplinary Team (MDT) eligibility meeting and IEP Annual Review meeting for November 7, 2013. On September 19, 2013, school staff attempted, unsuccessfully to reach Mother by telephone to notify her about the meeting. School staff sent Mother meeting notices on September 19, 2013 (Certified/Registered Mail), September 20, 2013, October 20, 2013 (by mail and by notice in Student's book bag), October 29, 2013 (by mail), November 6, 2013 (telephone message.) Exhibit R-7, Testimony of Special Education Teacher.

14. On November 7, 2013, Student's MDT/IEP team convened at City Middle School 1. Mother did not attend the meeting.⁴ Student's continued eligibility for special

³ Failure to convene an IEP meeting when requested by the parent was not identified as an issue in this case. See Prehearing Order.

⁴ The convening of the November 7, 2013 IEP meeting without the parent's participation was not identified as an issue in this case. See Prehearing Order.

education as a child with an SLD primary disability was confirmed. Exhibit P-11.
Student's Specialized Instruction Services were increased from 25 to 27.5 hours per week. His Behavioral Support Services were reduced from 180 minutes per month to 120 minutes per month. Exhibits P-8, P-9.

15. The November 7, 2013 IEP has the "NO" box checked for the question, "Does the child's behavior impede the child's learning or that of other children?" The "NO" box was checked by error. Student's behavior did impede his learning. Testimony of Special Education Teacher.

16. SCHOOL PSYCHOLOGIST conducted a Triennial Psychological Reevaluation of Student in the fall of 2013. She issued her report on November 18, 2013, after the November 7, 2013 IEP meeting. The assessment included a Woodcock-Johnson III (W-J III) educational achievement test, a classroom observation, a teacher interview and an education records review. The report does not reflect that School Psychologist conducted cognitive testing or a behavioral assessment, or that she reviewed Student's prior psychological and educational evaluations. Student's scores on the W-J III, administered on September 21, 2013, were summarized in the November 18, 2013 report as Average for mathematics calculation skills, Borderline for written language skills, for spelling and for writing fluency, and Borderline-to-Extremely Low for reading skills. Student's academic skills tested in the Borderline range. School Psychologist concluded that her assessment supported Student's continued eligibility for special education services under SLD criteria. Exhibit P-10.

17. Student was suspended off-site for 27 days following an alleged incident of sexual misconduct at school on May 1, 2014. Exhibit P-3, Testimony of Mother.

18. Nonpublic School, located in the District of Columbia, serves children with

ED and SLD disabilities. The school implements a behavior modification program. Student has been accepted by Nonpublic School for the 2013-2014 school year. There are seven students in the middle school SLD program, where Student would be placed. The class is staffed by a teacher, a teaching assistant and two dedicated aides assigned to specific children. The school holds a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education. The annual tuition charge is approximately \$30,000.00. Testimony of Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

The decision of the Hearing Officer must be based solely upon the oral and written evidence presented at the hearing, which was not extensive in this case. *See* Office of Dispute Resolution, Standard Operating Procedures, § 1003. Plaintiff, in particular, called only three witnesses – herself, the private school official and Services Provider. My conclusions of law are, necessarily, reflective of the limited evidence offered at the due process hearing.

1. Appropriateness of November 7, 2013 IEP

- Is DCPS' November 7, 2013 IEP inappropriate for Student because it fails to include a disability classification for ED, because it states incorrectly that Student's behavior does not impede his learning or that of other students; because the IEP annual goals are inappropriate; because the Behavioral Support related services are not appropriate in that the hours per month are insufficient and not all counseling is specified to be on individual basis and because the IEP does not provide for Student's placement in a special therapeutic day school?
- Has DCPS denied Student FAPE by failing to update his BIP since December 2012?

Petitioner contends that Student's November 7, 2013 is inadequate because the annual goals are not appropriate, the IEP provides insufficient Behavioral Support services, the IEP does not provide for placement in a special school and it does not include an updated BIP. DCPS maintains that the IEP was appropriate when developed, except that the answer box was incorrectly checked "NO" for the IEP form query as to whether Student's behavior impedes his learning, which was a scrivener's error.

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." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). 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 220-221.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report at 11 (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)).

Id. at 221.

Disability Classification

Petitioner contends that Student’s IEP should have included the disability classification Emotional Disturbance, in addition to SLD. However, 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. A student’s entitlement under the IDEA is to FAPE and not to a particular label. The child’s identified needs, not the child’s disability category, determine the services that must be provided to her. *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006). *See, also, 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). Moreover, at the due process hearing, Petitioner offered no competent evidence that Student meets the IDEA criteria for the ED disability. I find that the November 7, 2013 IEP was not inadequate for not identifying ED as one of the Student’s disabilities.

IEP Annual Goals

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 curriculum. *See* 34 CFR § 300.320(a)(2). Petitioner contends that the IEP goals, generally, were inappropriate. The only evidence Petitioner offered on the adequacy of the IEP goals was the testimony of Service Provider, who was at one time a testing consultant for the Lindamood-Bell Learning Program. Service Provider opined that the IEP's goals for Reading lacked sufficient focus on phonics and phonemic awareness, as opposed to reading comprehension. Services Provider never met Student or assessed his reading needs. The hearing exhibits, on which Service Provider's opinion was based, provided only the sparsest of data on Student's reading strengths and needs. (Even the post-IEP November 18, 2013 psychological reevaluation contains a paucity of data on Student's academic strengths and weaknesses.) Therefore, I discount Service Provider's opinion that the IEP goals should have been more focused on phonics and phonemic awareness in order for Student to be involved in and make progress in the general education curriculum.

Notwithstanding, I note that the annual goals for Reading in the November 7, 2013 IEP are identical to the annual goals in the December 12, 2012 IEP – even though the 2013 IEP indicates that during the intervening period, Student had progressed one grade level in decoding and three grade levels in reading comprehension. The IDEA regulations require that a child's IEP team revises the IEP, as appropriate, to address, *inter alia*, lack of expected progress toward the annual goals, the results of any reevaluation or the student's anticipated needs. *See* 34 CFR § 300.324(b). I find that the reading goals in the 2013 IEP were not appropriate because the IEP team failed to

update Student's goals based upon his reported improved reading levels.

Including inappropriate annual goals in an IEP is a procedural violation of the IDEA. *See, e.g., D.B. v. Ocean Tp. Bd. of Educ.*, 985 F.Supp. 457, 536 (D.N.J.1997) (Failure of IEP to include the required components of some annual goals made form of IEP procedurally deficient.) “Although a procedural violation may rise to the level of a denial of a FAPE, this Circuit, along with several others, has held that ‘an IDEA claim is viable only if those procedural violations affected the student’s substantive rights.’” *K.E. v. District of Columbia*, 2014 WL 242986, 5 (D.D.C.Jan. 23, 2014), citing *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). “Under the IDEA’s implementing regulations, substantive harm occurs if the preponderance of the evidence establishes that the procedural inadequacies: “(i) [i]mpeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of the educational benefit.” *K.E., supra*, citing 34 C.F.R. § 300.513(a)(2). At the hearing in this case, Petitioner made no showing that the IEP team’s failure to update Student’s goals for Reading impeded his right to a FAPE or the parent’s opportunity to participate in the decision-making process⁵ or caused a deprivation of educational benefit. Notwithstanding, under the IDEA, DCPS must still ensure that the IEP annual goals are reviewed and revised, as appropriate, to meet Student’s educational needs that result from his disability. *See* 34 CFR § 300.320(a)(2)(i). Accordingly, I will order DCPS to ensure that this is done.

Behavioral Support Services

Petitioner offered no evidence that the 120 minutes per month of Behavioral

⁵ Mother testified that she had not seen the IEP prior to the due process hearing.

Support Services provided in the 2013 IEP were insufficient to meet Student's needs or that Student required individual counseling, as opposed to group counseling. Special Education Teacher testified that Student did not have aggressive behaviors which would have warranted more behavior support services. I also conclude that the scrivener's error of checking the "No" box, instead of the "Yes" box on the IEP form query of whether Student's behavior impedes his learning, had no substantive effect on the appropriateness of the IEP.

Therapeutic Day School

The IDEA "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). In the November 7, 2013 IEP, Student was placed in a full-time special education program, which, at City School 1, was implemented in the self-contained BES program. Petitioner adduced no evidence at the hearing that City School 1 is not able to implement Student's IEP or that the least restrictive environment for Student is a special school where he would not have interaction with nondisabled peers.

Behavior Intervention Plan

Student's Behavior Intervention Plan (BIP) was developed by the City Middle School 2 IEP team in December 2012. Parent contends that the BIP should have been updated in the 2013-2014 school year. However, unlike an IEP, the IDEA does not

require that a BIP be updated annually. *Cf. School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006). (IDEA does not require that a BIP be incorporated into a child's IEP.) Special Education Teacher, who was Student's only classroom teacher for school year 2013-2014, testified that she implemented Student's 2012 BIP and kept track of whether the interventions worked or did not work. Moreover, for the 2013-2014 school year, Student was placed in the Behavior Education Support (BES) classroom at City Middle School 1, a behavior support classroom with only eight students. Special Education Teacher testified that this program met Student's behavioral needs. Petitioner offered no evidence that the 2012 BIP was inadequate or that Student required a revised BIP for the 2013-2014 school year.

Petitioner's burden of proof to establish that the November 7, 2013 IEP was inappropriate required that she prove that when adopted, the IEP was not reasonably calculated to provide Student educational benefits. *See K.S., supra*, 962 F.Supp.2d at 221. I conclude, based upon the oral and written evidence presented at the hearing, that she has not met that burden.

2. Implementation of November 7, 2013 IEP

- Did DCPS deny Student a FAPE by failing to implement the Behavioral Support Services provisions in the November 7, 2013 IEP?
- Did DCPS deny Student a FAPE by failing to test student at regular intervals to determine his academic progress and modify programs if adequate progress is not made, as required in the IEP?
- Did DCPS deny Student a FAPE by failing to provide specialized instruction as required by the IEP because there was no scientifically motivated reading program used to implement the goals and objectives as written?
- Did DCPS deny Student a FAPE by failing to gather anecdotal data and maintain records of programs utilized and student response to interventions utilized in order to determine progress?

Petitioner has asserted several claims concerning DCPS' alleged failure to implement requirements of the November 7, 2013 IEP, including the Behavioral Support Services requirement; an IEP requirement to test Student at regular intervals, gather data and maintain records to determine his academic progress; and a requirement to use a scientifically motivated reading program.

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.* (internal quotation and citation omitted.)

Behavioral Support Services

The November 7, 2013 IEP required that Student be provided 120 minutes of Behavioral Support Services per month. The City Middle School 1 Social Worker's Service Tracker records show that from November 2013 through May 13, 2014, Student was provided individual or group counseling, on at least a weekly basis, except during school vacations and when Student was absent. Student was on long-term suspension after May 13, 2014 and apparently did not receive counseling services at City Middle School 1 after that date. Petitioner has not shown that the school failed to provide the

Behavioral Support Services required by Student's IEP.

Testing and Data Gathering for Progress on IEP Goals

Petitioner contends that DCPS denied Student a FAPE by failing to test him at regular intervals and gather and maintain data to determine his academic progress under the November 7, 2013 IEP, and modify programs as appropriate. Petitioner cited no requirement in the IDEA for a school to gather anecdotal data and maintain records of programs utilized, and student response to interventions utilized, in order to determine progress. *Compare* 34 CFR § 300.307(a) (State must “permit” the use of a Response to Intervention (RTI) process for determining whether a child has an SLD.) The IDEA does require that each IEP provide a description of how the child's progress toward meeting the IEP annual goals will be measured. *See* 34 CFR § 300.320(a)(3). The Act does not prescribe the intervals between progress reports or the form that the measurement will take. Student's November 7, 2013 IEP provides that his progress toward meeting the IEP annual goals will be measured using work samples, checklists, practice and drill, observations, at-opportunity quizzes and at each nine weeks. Progress on behavioral support goals was to be measured with practice and drill, weekly verbal responses and weekly reports. Petitioner adduced no evidence that Student's progress was not timely evaluated with these measures.

Scientifically Motivated Reading Program, Data and Record Keeping

Petitioner also contends that City Middle School failed to implement a “scientifically motivated reading program” to implement the goals and objectives in Student's IEP. Petitioner has cited no requirement in the November 7, 2013 IEP for the use of a scientifically-motivated reading program. City Middle School 1 did begin using the Read 180 program, apparently a research-based program, for Student's class in

January 2014.⁶

In sum, I find that Petitioner has not met her burden of proof to establish that DCPS failed to implement substantial or significant provisions of Student's November 7, 2013 IEP.

3. Has DCPS denied the student FAPE by failing to identify and place the student at an appropriate educational placement that can meet his academic and emotional-behavioral needs for school year 2014-2015?

The remaining issue asserted by the Petitioner is that DCPS has failed to offer Student a suitable placement for the 2014-2015 school year. DCPS maintained in its response to the due process complaint that this issue was not ripe for decision because when the complaint was filed, DCPS had not yet decided the 2014-2015 school year location of services for Student. However, Student's June 24, 2014 end-of-year Report Card, Exhibit R-8, states that Student had passed every course for the year and that City Middle School 1 "look[ed] forward to welcoming [him] back to school in August." I conclude that Petitioner has established, by the preponderance of the evidence, that DCPS intends to continue to offer the BES program at City Middle School 1 as the location of services to implement Student's IEP. This issue is therefore "ripe" for decision.

To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs.

⁶ According to *Wikipedia, The Free Encyclopedia*, READ 180 is the result of research that began in 1985 with the work of Dr. Ted Hasselbring and members of the Cognition and Technology Group at Vanderbilt University. With a grant from the United States Department of Education's Office of Special Education, Dr. Hasselbring developed software that used student performance data to individualize and differentiate the path of computerized reading instruction. This software became the prototype for the READ 180 program. Scholastic READ 180, http://en.wikipedia.org/w/index.php?title=Scholastic_READ_180&oldid=530747023 (last visited Aug. 8, 2014).

See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C.Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C.Cir.2010). I have found in this decision that Petitioner has not met her burden or proof to establish that the November 7, 2013 IEP was not reasonably calculated to provide Student educational benefits. Based upon Student's grades and the testimony of his classroom teacher, Student did in fact make educational progress under the IEP. *See A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (Highly relevant whether student was making progress and experiencing meaningful educational benefit from his placement.) Neither did Petitioner offer any evidence that City Middle School 1 is not capable of fulfilling Student's educational goals and requirements. Therefore, based upon the evidence presented at the hearing, I conclude that Petitioner has failed to establish that City Middle School 1 is not an appropriate educational placement for Student for the 2014-2015 school year.

Summary

Based upon the testimony of the witnesses and the exhibits admitted at the due process hearing, I have found that Petitioner failed to meet her burden of proof to establish that Student has been denied a FAPE either because the November 7, 2013 IEP was inappropriate or because DCPS failed to implement substantial or significant provisions of the IEP. I have found that the annual goals for Reading in the November 7, 2013 IEP, duplicated from the December 18, 2012 IEP, were inappropriate in light of Student's documented progress in Reading after the 2012 IEP was developed. Although I do not find that Student was denied a FAPE by this procedural violation of the IDEA,

the Act requires that his IEP must be reviewed and appropriately revised.

As with any IEP review, when it revises Student's IEP, the IEP team must, *inter alia*, consider any reevaluations of the student. In this case, the IEP team must consider School Psychologist's November 18, 2013 psychological reevaluation. Because that assessment lacks cognitive testing, a behavioral assessment or any consideration of prior evaluations of Student, DCPS may find it advisable to conduct a thorough and comprehensive reevaluation of Student to enable the IEP team to informedly consider his academic, developmental, and functional needs. *See* 34 CFR § 300.324(a).⁷

ORDER

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

1. Within ten business days of entry of this order, DCPS shall convene Student's IEP team to review the November 7, 2013 IEP and revise the IEP, as appropriate, in accordance with this decision and 34 CFR § 300.324(b), including, but not limited to, the adoption of appropriate annual academic goals;
2. Based upon counsel's representation that the expedited discipline claims in Petitioner's due process complaint were voluntarily settled, DCPS' motion to dismiss the expedited portion of the complaint is denied; and
3. All other relief requested by the Petitioner herein is denied.

Date: August 10, 2014

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

⁷ Because the adequacy of School Psychologist's psychological reevaluation of Student was not asserted as an issue in this case, I do not order DCPS to reevaluate Student. However, I strongly encourage DCPS to have qualified professional staff review the November 18, 2013 psychological evaluation report to determine whether a comprehensive reevaluation is needed.

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).