

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
February 18, 2015

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
)	
<i>Petitioner,</i>)	
)	
v.)	
)	Date Issued: February 16, 2015
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on December 4, 2014 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On December 5, 2014, Respondent filed its Response, denying that Respondent denied Student a free appropriate public education (“FAPE”). The Hearing Officer Determination (“HOD”) in this matter is due February 17, 2015.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) by telephone on January 5, 2014, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by January 27, 2015 and that the DPH would be held on February 2, 2015 and February 3, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued January 5, 2015.

¹ Personal identification information is provided in Appendix A.

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The DPH was held on February 2, 2015 and February 3, 2015 at the Office of Dispute Resolution, . Petitioner elected for the hearing to be closed.

Petitioner's and Respondent's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-5, P-8, and P-10 through P-21 were admitted without objection. Petitioner withheld and did not offer into evidence exhibits P-6, P-7 and P-9. Respondent's exhibits R-1 through R-9 were admitted without objection.

Petitioner called the following witnesses at the DPH:

- (a) Petitioner/Parent;
- (b) Educational Advocate;
- (c) Nonpublic Associate Head of School;
- (d) Nonpublic IEP Coordinator;
- (e) Nonpublic Psychologist.

Respondent called the following witnesses at the DPH:

- (a) District Middle School Principal;
- (b) District Middle School Registrar;
- (c) District Middle School Special Education Coordinator;
- (d) Compliance Case Manager.

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to comply with 34 CFR 300.323(e) by failing to reconvene Student's MDT/IEP team, after a request was received on August 15, 2014, to provide and to offer Student an IEP, and to determine Student's placement and location of services.
- (b) Whether DCPS denied Student a FAPE by failing to comply with its child find obligations under 20 U.S.C. § 1412(a)(1)(A) by failing to assume responsibility for Student's special education needs as of August 15, 2014, after being made aware of those needs by way of a settlement agreement between parent and LEA Charter, a notice sent to the special education coordinator at District Middle School, the filing of a DPC and participation in an RSM regarding Student.
- (c) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate educational placement/location of services as of September 11, 2014.
- (d) Whether DCPS denied Student a FAPE by failing to implement Student's IEP as of September 11, 2014.

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- (e) Whether DCPS denied Student a FAPE by failing to timely reevaluate Student beginning as of October 3, 2014.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) an Order that DCPS comply with Student's and parent's invoking Student's stay put rights at the Kingsbury Day School according to his May 5, 2014 IEP during the pendency of this litigation, including providing Student with transportation services.
- (b) an Order that DCPS place and fund Student at the Kingsbury Day School for the 2014-2015 school year and provide Student with transportation services.
- (c) an Order that DCPS fund Parent's independent comprehensive psychological, speech and language, occupational therapy, neuropsychological, and psychiatric assessment.
- (d) an Order that within 10 school days upon receipt of the last of the assessment, DCPS shall reconvene Student's MDT/IEP team at Kingsbury Day School to review Student's evaluations and review and revise Student's IEP as necessary and discuss and determine placement for the 2015-2016 school year.
- (e) an Order that DCPS reimburse Parent for any monies Parent had to pay as a result of DCPS' failure to provide Student with transportation services since the start of the 2014-2015 school year.

FINDINGS OF FACT

1. Student resides with his mother ("Parent"/"Petitioner") in Washington, D.C.²

2. Student has been determined eligible for special education and related services under the classification of Emotional Disturbance ("ED").³

Student's Recent School Enrollment History

3. Student attended LEA Charter School during the 2010-2011 school year. LEA Charter School serves as its own local education agency and is, therefore, responsible for providing special education and related services to all of its eligible students.⁴

4. During the 2010-2011 school year, Student's IEP team met several times and determined that, due to the nature and severity of Student's educational challenges, Student needed a more restrictive setting. LEA Charter School assigned Student to Nonpublic School as Student's location of services.⁵

² Testimony of Parent.

³ P-1-1; R-6-1.

⁴ Testimony of Educational Advocate.

⁵ *Id.*

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5. In January 2014, LEA Charter School and Parent entered into a settlement agreement in which they agreed, among other things, that Parent would enroll Student with an LEA other than LEA Charter School prior to the start of the 2014-2015 school year, and that the new LEA would become responsible for all of Student's special education and related services from the time of enrollment.⁶

6. Parent's counsel sent an electronic correspondence to District Middle School Special Education Coordinator on August 15, 2014 indicating that Student's previous LEA was no longer in operation, stating that District Middle School was Student's neighborhood school, and requesting that District Middle School convene an multidisciplinary team ("MDT")/IEP team meeting for Student.

7. By return electronic mail on August 20, 2014, District Middle School Special Education Coordinator indicated to Parent's counsel that District Middle School would convene an IEP meeting for Student once Student was enrolled at District Middle School.⁷

8. Parent enrolled Student at District Middle School on or around August 26, 2014, and registered Student at District Middle School on or around September 11, 2014. "Enrollment" means that Parent completed an enrollment form and Student's name was added to the school roster. "Registered" means that Student's residency has been verified.⁸

9. School had already started for the 2014-2015 when Parent enrolled Student at District Middle School in August 2014.⁹

10. Petitioner and DCPS personnel met on three occasions — September 2014, October 2014 and December 2014 — for resolution session meetings ("RSMs") after DCPS became Student's LEA.

11. During one or more RSMs, DCPS offered to conduct certain reevaluations for Student, provided Student began attending District Middle School. Parent was in favor of DCPS initiating a reevaluation process, provided DCPS included certain evaluations Parent deemed particularly important; however, Parent was not in agreement with transferring Student from Nonpublic School to District Middle School.

12. DCPS has not issued a Prior Written Notice or a location of services letter for Student, including at either of the three RSMs.¹⁰

13. DCPS verbally offered District Middle School to Parent as a location of services during one or more of the three RSMs.¹¹

⁶ R-1-3.

⁷ P-5.

⁸ Testimony of District Middle School Principal.

⁹ Testimony of Parent.

¹⁰ Testimony of Compliance Case Manager.

¹¹ *Id.*

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14. Student has attended Nonpublic School from Extended School Year services starting in the summer of 2011, through the present time.¹²

IEP and Services Received

15. Student's current individualized education program ("IEP") is dated April 24, 2014, and calls for Student to receive 27.5 hours per week of specialized instruction outside the general education setting; 360 minutes per month of behavioral support services outside the general education setting; 360 minutes per month of speech-language pathology outside the general education setting; and 360 minutes per month of occupational therapy outside the general education setting.¹³

16. Student's IEP describes his least restrictive environment ("LRE") as a "low class size with specialized instruction and integration of therapies in an out of general education, non public setting."¹⁴

17. Student currently receives at Nonpublic School 27.5 hours per week of specialized instruction outside the general education setting; 360 minutes per month of behavioral support services outside the general education setting; 360 minutes per month of speech-language pathology outside the general education setting; and 360 minutes per month of occupational therapy outside the general education setting.

18. During its three meetings with Petitioner in September, October and December of 2014, Respondent indicated that it can provide Student what Respondent would consider to be an "appropriate" IEP; however, it has not proposed an alternative IEP for Student.¹⁵

Academic Performance, Attendance and Behavior.

19. Academically, Student is several years behind grade level.¹⁶

20. Student has difficulty processing, expressing and organizing his thoughts, and has motor skills deficits.¹⁷

21. Student presents as younger than his age in terms of how he responds to events. He sometimes has an inadequate understanding of social cues and engages in age inappropriate behaviors when over-stimulated, though his behaviors are generally more internalized and not violent or aggressive. Student generally responds based on his own needs, rather than what is socially expected. Student can be fragile, and can have difficulty expressing what is going on

¹² Testimony of Educational Advocate.

¹³ P-1-14.

¹⁴ P-1-15; R-6-15.

¹⁵ Testimony of Educational Advocate; testimony of Nonpublic IEP Coordinator; testimony of Compliance Case Manager.

¹⁶ Testimony of Nonpublic IEP Coordinator.

¹⁷ *Id.*

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with his mind or emotions at any given time. Student's ED does not manifest as aggressive behaviors, but rather are more internalized behaviors.¹⁸

22. Student is in a classroom with fewer students (five students total) than the typical already small class at Nonpublic School, due to his slow processing abilities, the intensity of his academic needs, his vulnerability to distractions, and the additional supports he needs, such as continued repetition, in order to avoid falling behind academically.¹⁹

23. Student is in a classroom with students of varying disabilities, but with the same general level of academic deficits as he has.²⁰

24. Student has made academic progress during the 2013-2014 and 2014-2015 school years.²¹

Transportation

25. Student's IEP indicates that Student needs transportation services.²²

26. When LEA Charter was Student's LEA, Student received transportation services through the Office of State Superintendent for the District of Columbia's ("OSSE").

27. Starting with the 2014-2015 school year, once DCPS became Student's LEA, Parent had to pay for Student's transportation to and from school via bus and train, in the amount of approximately \$30 per month.²³

Nonpublic School

28. Nonpublic School is a full-time special education school with significant therapeutic supports. All of its services are provided outside the general education setting, and classes are small.

29. Nonpublic School is included on the OSSE list of approved nonpublic day schools.²⁴ Nonpublic School's daily tuition rate has been approved by OSSE.²⁵

30. Nonpublic School can and does provide Student with the services listed on his IEP, including 27.5 hours of specialized instruction and the related services included on Student's IEP.²⁶

¹⁸ Testimony of Nonpublic Psychologist; testimony of Nonpublic IEP Coordinator.

¹⁹ Testimony of Nonpublic IEP Coordinator; testimony of Nonpublic Psychologist.

²⁰ Testimony of Nonpublic IEP Coordinator.

²¹ P-21; testimony of Nonprofit IEP Coordinator.

²² P-1-17; R-6-17.

²³ Testimony of Parent.

²⁴ P-53.

²⁵ Testimony of Nonpublic Special Education Coordinator.

²⁶ Testimony of District Middle School Principal.

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The Behavioral and Educational Support (“BES”) Program

31. DCPS’ BES Program serves students from Kindergarten through twelfth grade that have emotional disabilities and/or challenging behaviors.²⁷

32. District Middle School, a public school, educates general education as well as special education students.²⁸

33. District Middle School has a self-contained BES classroom within the school, which DCPS offered as a potential location of services for Student.²⁹

34. In the BES classroom at District Middle School, Student would be in a classroom of no more than ten students.³⁰

35. The BES classroom at District Middle School could provide Student a maximum of 22.5 hours of the 27.5 hours of specialized instruction included on Student’s IEP. In addition, the BES classroom at District Middle School could provide Student with the related services included on Student’s IEP.³¹

CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the student’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 educational benefit. 34 C.F.R. § 300.513(a).

²⁷ Testimony of District Middle School Principal; testimony of Compliance Case Manager.

²⁸ Testimony of District Middle School Principal.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

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1. Whether DCPS denied Student a FAPE by failing to comply with 34 CFR § 300.323(e) by failing to reconvene Student’s MDT/IEP team, after a request was received on August 15, 2014, to provide and to offer Student an IEP, and to determine Student’s placement and location of services.

The IDEA states in section 34 CFR § 300.323(e),

[i]f a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child’s IEP from the previous public agency), until the new public agency either—(1) Adopts the child’s IEP from the previous public agency; or (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

Here, Student, who is a child with a disability, had an IEP in effect at District of Columbia-based LEA Charter School (a public agency in the same state as DCPS). Student transferred from LEA Charter School and enrolled at District Middle School in the same school year (2014-2015 school year). Based on the statute, once Student enrolled in a DCPS school (on or around August 26, 2014), DCPS became responsible for providing Student a FAPE in the form of services comparable to the services described in Student’s IEP from LEA Charter School, until such time as DCPS either: (1) adopted Student’s IEP from LEA Charter or (2) developed, adopted and implemented its own statutorily permissible IEP.

The evidence does not reflect that DCPS ever adopted Student’s IEP from LEA Charter School, or that DCPS ever developed its own IEP for Student. However, 34 CFR § 300.323(e) does not indicate that it is mandatory for DCPS to take either of these actions by any date certain, provided the LEA is providing Student services comparable to those described in the IEP from LEA Charter in the meantime. DCPS did not, however, provide comparable services in the meantime, which is a denial of FAPE. Student’s IEP calls for him to receive five more hours of specialized instruction per week than District Middle School could provide Student, which is a significant difference.

Respondent argues that the services District Middle School could offer Student are indeed comparable to those listed in Student’s IEP. One case Respondent cites for this proposition is *Sterling A v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2008). In *Sterling*, the court found that offering a hearing impaired student hearing services at his local school was comparable to offering those same services to him at his home. Finding that “comparable services” in IDEA refers to offering similar or equivalent services, rather than necessarily identical services, the court found the proposed service comparable to the original service, noting that only the location and not the substance of the service would change. Respondent also cites *Metro Nashville Pub. Schs.*, 51 IDELR 116 (SEA TN 2008). This case involved a student who transferred to a district where a reading resource class was referred to by a different name than in his previous district, but where the student would not receive a decrease

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in services (and would arguably receive an increase in services). Both cases are distinguishable from Student's situation.

DCPS has offered a placement that differs in several ways from Nonpublic School. Nonpublic School, for example is a full-time self-contained school with no general education students. District Middle School is a public school with general education and special education students, and a self-contained classroom within the school. The class size in the self-contained BES program at District Middle School is larger than Student's class at Nonpublic School. Most notably, however, Student would receive significantly fewer hours of specialized instruction than his IEP calls for at District Middle School. Conversely, Student's IEP is fully implemented at Nonpublic School. Therefore, District Middle School is not comparable (neither in the sense of being identical nor in the sense of being similar) to Nonpublic School for this particular Student at this juncture. For these reasons, the cases Respondent cites are distinguishable.

DCPS did not comply with 34 CFR § 300.323(e), which is a denial of FAPE, not necessarily because DCPS failed to reconvene Student's MDT/IEP team after a request was received on August 15, 2014,³² but because it did not provide Student services comparable to those in Student's IEP during a time before DCPS either adopted Student's IEP from LEA Charter, or created its own IEP for Student. Petitioner met the burden of proof on this issue.

II. Whether DCPS denied Student a FAPE by failing to comply with its child find obligations under 20 U.S.C. § 1412(a)(1)(A) by failing to assume responsibility for Student's special education needs as of August 15, 2014, after being made aware of those needs by way of a settlement agreement between parent and LEA Charter School, a notice sent to the special education coordinator at District Middle School, the filing of a DPC and participation in an RSM regarding Student.

Pursuant to 34 C.F.R. §§ 300.111, 300.131, DCPS has an affirmative obligation to identify, locate and evaluate all children residing in the District of Columbia with disabilities who are in need of special education and related services, including children with disabilities who are attending private schools. DCPS' Child Find obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011).

DCPS became aware of Student's special education needs and that DCPS was Student's new LEA by way of a communication from Petitioner's counsel to DCPS on or around August 15, 2014. Student enrolled at a DCPS school on or around August 26, 2014, and DCPS participated in several RSMs with Petitioner starting in September 2014. Because DCPS became aware of Student's special education needs as of August 2014, it was responsible for meeting

³² The parties disagree as to whether any or all of the three RSMs were also MDT meetings; however, the Hearing Officer does not need to decide this question. Whether or not the three RSMs were also MDTs, the relevant consideration is that DCPS was obligated to provide Student services comparable to what the IEP he brought with him from LEA Charter contained until such time as it convened an IEP/MDT meeting to adopt the IEP or develop a new one, which did not occur.

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those needs from that point. DCPS did not make a formal location of services offer; however, it did make a verbal offer to Petitioner to place Student at District Middle School. Respondent points out that Petitioner expressed an intent to not have Student attend District Middle School, even if District Middle School could implement Student's IEP. In this instance, however, Parent's unwillingness to accept DCPS' offer does not weigh against Petitioner's argument, because the program DCPS offered Petitioner was not capable of implementing Student's IEP, as further discussed below.

Since DCPS had not proposed an alternative IEP, Student would need to receive the services included in his 2014 IEP in order to receive a FAPE. As stated above, DCPS did not offer to provide the services (or comparable services) to Student; therefore, Petitioner met her burden of proving that DCPS denied Student a FAPE by failing to comply with its child find obligations under 20 U.S.C. § 1412(a)(1)(A) by failing to assume responsibility for Student's special education needs as of August 15, 2014, after being made aware of those needs by way of a settlement agreement between parent and LEA Charter School, a notice sent to the special education coordinator at District Middle School, the filing of a DPC and participation in an RSM regarding Student.

III. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate educational placement/location of services as of September 11, 2014.

Petitioner enrolled Student at District Middle School on August 26, 2014 and registered Student at District Middle School on September 11, 2014. Therefore, at least by September 11, 2014 if not sooner, DCPS was aware of its obligation to provide Student a FAPE. Pursuant to 34 CFR § 300.116(b)(1), a student eligible for special education and related services must have a placement that, among other things, "[i]s based on the child's IEP." The only IEP Student currently has is the 2014 IEP created by Nonpublic School when LEA Charter School served as Student's LEA. DCPS has not created a different IEP for Student since it became Student's LEA; therefore, it must provide Student a placement/location for receiving educational services that can implement Student's current IEP. DCPS informally offered District Middle School as a location of services for Student; however, District Middle School cannot implement Student's IEP, most notably in that it cannot provide Student 27.5 hours of specialized instruction per week. Because DCPS did not offer an educational placement/location of services that could implement Student's IEP as of September 11, 2014 (if not before), Petitioner has met her burden on this issue.

IV. Whether DCPS denied Student a FAPE by failing to implement Student's IEP as of September 11, 2014.

In reviewing failure-to-implement claims, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir. Sept. 11, 2007). Where an LEA's failure to implement is material (not merely *de minimus*), courts have held that the standard for

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determining whether there has been a denial of FAPE is not whether the student has suffered educational harm. *See Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

In this case, the difference between what Student's IEP called for and what District Middle School could provide is substantial. A five hour per week difference means that Student would miss approximately one hour of specialized instruction per day, and approximately twenty hours of specialized instruction per month, which would be a large proportion of missed services. DCPS did not implement or offer to implement Student's IEP; thus, Petitioner met her burden on this issue.

V. Whether DCPS denied Student a FAPE in November 2013 by failing to timely reevaluate Student beginning as of October 3, 2014.

Petitioner argues that DCPS denied Student a FAPE by not conducting reevaluations: (1) because Parent requested reevaluations, and (2) because DCPS would have needed data from reevaluations prior to changing Student's educational placement/location of services from Nonpublic School to District Middle School, as DCPS proposed. The parties dispute whether Petitioner consented to/requested reevaluations of Student by DCPS. The Hearing Officer concludes from the evidence that Parent did not sign a written consent for reevaluation or unequivocally and unconditionally request evaluations, but that Parent was in agreement to having DCPS reevaluate Student under certain circumstances (namely: (1) that DCPS conduct the full battery of what Parent considered to be the relevant evaluations, and (2) that Student not have to transfer from Nonpublic School to District Middle School as a precondition of the reevaluations being conducted).

An LEA must ensure that a reevaluation of each child with a disability is conducted when the student's parent or teacher requests a reevaluation; however, a reevaluation may occur not more than once a year, unless the parent and LEA agree otherwise. *See* 34 CFR § 300.303. Once a reevaluation has been requested, the IEP team and other professionals, as appropriate, must review existing evaluation data. On the basis of that review and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child. *See* 34 CFR § 300.305(a); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46641 (August 14, 2006).

The IDEA does not specify a time frame within which an LEA must conduct a parentally requested reevaluation. *See Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005) (decided under the IDEA, prior to enactment of the 2004 amendments to the statute.) Rather, "[r]evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 Individuals

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with Disabilities Education Law Report 1127, 1129 (1995)). *See, also, Williams v. District of Columbia*, 771 F.Supp.2d 29, 31 n.1 (D.D.C.2011). Likewise, it stands to reason that reevaluations an IEP team deems necessary should be conducted in a reasonable period of time, and without undue delay. In this case, the parties held RSMs (which Respondent also describes as MDT/IEP team meetings) in September, October, and December 2014. DCPS informally proposed District Middle School for Student, but Student never transferred from Nonpublic School to District Middle School. Student had recently had a series of reevaluations (in the same calendar year) which Nonpublic School formally reviewed in 2014, prior to drafting Student's current IEP. The instant DPC was filed on December 4, 2014.

Under these circumstances, the Hearing Officer concludes that, to the extent reevaluations are warranted as Petitioner asserts, the LEA had not engaged in an unreasonable delay by not conducting them as of the filing of the DPC. Moreover, the purpose of any such reevaluations would have been to give DCPS greater insight into Student needs, not because Parent is claiming to be dissatisfied with the services outlined in Student's IEP. Student has continued attending Nonpublic School, and has been receiving the services outlined in his IEP. Therefore, even if DCPS could be said to have engaged in an unreasonable delay in conducting the evaluations, this procedural violation would not have risen to the level of a denial of FAPE, because it would not have impeded Student's right to a FAPE, 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 caused a deprivation of educational benefit. Petitioner did not meet the burden of proving that DCPS denied Student a FAPE in November 2013 by failing to timely reevaluate Student beginning as of October 3, 2014.

Request for Placement at Non-Public School

An order for DCPS to fund a placement at Nonpublic School is part of the relief Petitioner seeks for those issues on which a denial of FAPE was found. Yet a denial of FAPE does not necessarily entitle a Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). Placement awards, must be tailored to meet the child's specific needs. *Id.* To inform this individualized assessment, courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Branham* at 12. Following is a discussion of each of the *Branham* factors as they relate to the facts of this case.

a. Nature and Severity of Student's Disability

Student's disabilities are multi-faceted and severe. His disability classification is Emotional Disturbance. He also requires and receives occupational therapy and speech and language. Academically, Student is several years behind grade level. Student has difficulty process, expressing and organizing his thoughts, and has motor skills deficits. Student is in a classroom with fewer students than the typical already small class at Nonpublic School, due to his slow processing abilities, the intensity of his academic needs, his vulnerability to distractions,

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and the additional supports he needs, such as continued repetition, in order to avoid falling behind academically.

Student presents as younger than his age, in terms of how he responds to events. He sometimes has an inadequate understanding of social cues, and engages in age inappropriate behaviors when over-stimulated, though his behaviors are generally more internalized and not violent or aggressive. Student generally responds to his own needs, rather than what is socially expected. Student can be fragile, and can have difficulty expressing what is going on with his mind or emotions at any given time. Student's ED does not manifest as aggressive behaviors, but rather are more internalized behaviors.

b. Student's Specialized Educational Needs

Student's current individualized education program ("IEP") is dated April 24, 2014, and calls for Student to receive 27.5 hours per week of specialized instruction outside the general education setting; 360 minutes per month of behavioral support services outside the general education setting; 360 minutes per month of speech-language pathology outside the general education setting; and 360 minutes per month of occupational therapy outside the general education setting.

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

Nonpublic School can and does provide Student with the services listed on his IEP. Student currently receives at Nonpublic School 27.5 hours per week of specialized instruction outside the general education setting; 360 minutes per month of behavioral support services outside the general education setting; 360 minutes per month of speech-language pathology outside the general education setting; and 360 minutes per month of occupational therapy outside the general education setting.

d. Cost of Placement at Private School

Nonpublic School is included on the Office of State Superintendent for the District of Columbia's ("OSSE") list of approved nonpublic day schools.³³ Nonpublic School's daily tuition rate has been approved by OSSE.³⁴

e. Extent to Which Private School Represents Least Restrictive Environment

Student's IEP describes his least restrictive environment ("LRE") as a "low class size with specialized instruction and integration of therapies in an out of general education, non public setting." Nonpublic School is a full-time special education school with significant therapeutic supports. All of its services are provided outside the general education setting, and classes are small. Student is in a classroom with fewer students (five students total) than the typical already small class at Nonpublic School, due to his slow processing abilities, the intensity of his academic needs, his vulnerability to distractions, and the additional supports he needs, such as continued repetition, in order to avoid falling behind academically. Nonpublic School can implement the number of hours of specialized instruction, as well as the related services, listed on Student's IEP.

³³ P-53.

³⁴ Testimony of Nonpublic Special Education Coordinator.

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By comparison, District Middle School is a public school. It has a BES classroom which DCPS offered as a potential location of services for Student. In the BES classroom at District Middle School, Student would be in a classroom of no more than ten students. The BES classroom at District Middle School could provide Student the related services, but only 22.5 hours of the 27.5 hours of specialized instruction included on Student's IEP.

Based on the *Branham* factors discussed above, the program at Nonpublic School is reasonably calculated to address Student's disabilities and educational needs. Accordingly, Nonpublic School is an appropriate placement for Student.

Request for Stay-Put Determination

Pursuant to 20 U.S.C. § 1415(j) of the Individuals with Disabilities Education Act ("IDEA"), except in circumstances inapplicable to this case, "during the pendency of any proceeding conducted pursuant to [the section titled, "Assistance for Education of All Children with Disabilities"], unless the State or local education agency and the parents otherwise agree, the child³⁵ shall remain in the then-current educational placement of the child." Likewise, IDEA's implementing regulations require that, except in circumstances inapplicable to this case, "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing . . . unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement." 34 C.F.R. §300.518(a).³⁶

Student was placed at Nonpublic School by his previous LEA, and has only attended Nonpublic School since the summer of 2011. Nonpublic School has been Student's "stay-put" placement during the pendency of this litigation.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. DCPS shall place and fund Student at Nonpublic School for the 2014-2015 school year and provide Student with transportation services;
- B. DCPS shall reimburse Nonpublic School for any and all reasonable and/or necessary costs associated with educating Student from the start of the 2014-2015 school year until Student's IEP is revised and a Prior Written Notice is issued placing Student at Nonpublic School or another appropriate school setting. DCPS is not required to reimburse Nonpublic School for any costs associated with educating Student prior to August 15, 2014;
- C. DCPS shall reimburse Parent for any monies Parent expended to pay reasonable and/or necessary costs associated with transporting Student between home (or other reasonable

³⁵ District of Columbia Municipal Regulations define "child" as "an individual between the ages of three and twenty-two," which includes Student, though he is an adult. 5-E D.C.M.R. 3001.1.

³⁶ This Order will refer to these statutory provisions collectively using the common term of art "stay-put" provisions.

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location) and Nonpublic School from the start of the 2014-2015 school year. DCPS is not required to reimburse Parent for any monies Parent may have expended for transportation services prior to August 15, 2014.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: February 16, 2015

/s/ NaKeisha Sylvester Blount
Impartial 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).