

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
May 9, 2014

PETITIONER,
on behalf of STUDENT,¹

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Hearing Date: April 25, 2014

Student Hearing Office,
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came for an expedited hearing 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 and Title 5-B, Chapter 5-B25 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by repeatedly sending him home in violation of the

¹ Personal identification information is provided in Appendix A.

IDEA's discipline procedures, by failing to comprehensively evaluate him for suspected disabilities and by failing to provide him an appropriate IEP and educational placement.

The student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on March 20, 2014, named DCPS as respondent. On April 11, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

Pursuant to the IDEA, the expedited due process hearing was convened before the undersigned Impartial Hearing Officer on April 25, 2014 at the Student Hearing Office in Washington, D.C. This Hearing Officer Determination must be issued within 10 school days after the hearing. 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. DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Mother testified, and called as witnesses EDUCATIONAL ADVOCATE and AUDIOLOGIST. DCPS called as witnesses LEA Representative and SPEECH-LANGUAGE PATHOLOGIST. Petitioner's Exhibits P-1 through P-30, p-37, p-38, p-50 and P-51 were admitted into evidence without objection. Exhibits P-31, P-33, P-36, P-39, P-40, P-42, P-44, P-52 and pages 4 and 5 of Exhibit P-32 were admitted over DCPS' objections. DCPS' objections to the remainder of Exhibit P-32 and to Exhibits P-43, P-45 and P-53 were sustained. Exhibits P-34, P-35, P-41, P-46 through P-49 were withdrawn. DCPS' Exhibits R-1 through R-13 were admitted without objection. Counsel for Petitioner made an opening statement. Following the presentation of Petitioner's case-in-chief, DCPS made a motion for a directed finding which I denied. Counsel for both parties made closing statements. Neither party requested leave to file a post

hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

- Whether DCPS has denied Student a FAPE in the current school year by repeatedly sending him home without convening an MDR meeting or making an appropriate manifestation determination.
- Whether DCPS denied the Student a FAPE by failing to fully, timely and comprehensively evaluate him in all areas of suspected disabilities;
- Whether Student’s April 10, 2013 IEP was inappropriate because it lacked one-to-one applied behavior analysis (ABA) services, counseling for anger management and oppositional defiance, assistance for redirection and assistance with focusing and behavior management, a dedicated aide, and extended school year (ESY) services;
- Whether Student’s April 10, 2013 IEP lacked appropriate math goals;
- Whether DCPS has failed to meet Student’s need for a full-time, stand-alone special education placement; and
- Whether DCPS has denied Student a FAPE by failing to fully implement his IEP the current school year, including failing to provide all OT and S/L services and classroom accommodations and services specified in the IEP.

For relief, Petitioner seeks an order for DCPS to fund Student’s placement, with transportation, at an appropriate public or non-public school, in a full-time, stand-alone special education facility; for DCPS to provide funding for independent educational evaluations (IEE), including a functional behavioral assessment (FBA), clinical evaluation/assessment in the areas of emotional, social and behavioral development, Vineland and or adaptive functioning assessment/evaluation, Occupational Therapy (OT) assessment, speech and language assessment, audiological

and/or auditory processing assessment; and a neuropsychological, psychiatric and/or neurological assessment/evaluation. In addition, Petitioner requests compensatory education for denial of FAPE to Student in the current school year; the development of an appropriate IEP with ABA techniques and a Behavior Intervention Plan (BIP); and a determination that Student's behaviors that led to his being sent home were a manifestation of his IDEA disability.

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 child, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education and related services as a student with an Other Health Impairment (OHI), based upon a "Brain Condition." Stipulation of counsel, Exhibit P-9. Student has been diagnosed with agenesis of the corpus callosum, a congenital brain abnormality. Exhibit P-11.

3. In the 2012-2013 school year, Student attended CITY SCHOOL 1, a DCPS special education day school. Student did very well at City School 1. Testimony of Mother. City School 1 closed at the end of the 2012-2013 school year and Student was assigned to CITY SCHOOL 2 for the 2013-2014 school year. Stipulation of counsel; Exhibit P-14. Student is currently enrolled in GRADE at City School 2. Testimony of Mother.

4. Student's April 10, 2013 Individualized Education Program (IEP), developed at City School 1, identified OHI as the child's primary disability and Adaptive-Daily Living Skills, Communication/Speech and Language and Motor Skills/Physical

Development as areas of concern. The IEP provided Student 26.5 hours per week of Specialized Instruction, two hours per month of Speech-Language (S/L) Pathology and two hours per month of Occupation Therapy (OT), all outside of the General Education setting. The IEP stated that no previous services had been attempted in the general education setting and that the IEP team believed that Student would be best served outside the general education setting. Exhibit P-6.

5. At the April 10, 2013 IEP team meeting, Student was reported to play well most times without incident, though he continued to have some difficulty with sharing. He participated in group and one-on-one activities without incident and was often eager and willing to answer questions or make statements. He loved praise. His OT provider reported that Student had made gains in OT sessions. His S/L provider reported that he was making good progress towards mastering his previous IEP communications goals. Exhibit P-19.

6. When Student was assigned to City School 2 for the 2013-2014 school year, he was placed in a non-categorical, self-contained special education classroom of eight children, taught by a special education teacher and a full time paraprofessional. Testimony of Mother. Since the beginning of the school year, Student has received without interruption the 26.5 hours per week of Specialized Instruction and two hours per month of S/L services specified in his April 10, 2013 IEP. Testimony of LEA Representative.

7. City School 2 did not have an OT provider from August 2013 until November 2013. Student did not begin receiving OT services at City School 2 until November 2013. Testimony of LEA Representative.

8. From the beginning of the school year until about February 2014, Mother

would receive telephone calls from CLASSROOM TEACHER or the school principal to take Student home because of his behaviors in class, including fighting with other children, disrupting the class and running out of the classroom. This would occur every week. Classroom Teacher told Mother that she could not handle Student because of his behaviors. On three occasions, Student was also formally suspended from school for one day, for fighting. Testimony of Mother.

9. In January 2014, SCHOOL SOCIAL WORKER conducted observations of Student in the classroom. In his Analysis of Information Revealed by Observations, School Social Worker reported that Student was,

Very physically aggressive and destructive. Has been predatory of female students and male students that are smaller than him. For example, kicks students while sleeping. Uses profane language toward teachers. Ran out of class through the back door on two occasions. Very difficult to redirect. Tantrums begin when he is denied access to a desired item or action. Very concerned about his mom. Sometimes he goes looking for mom (i.e., when he ran out the back door). Behaviors have also been reported in all settings: art, gym, music, and sometimes Spanish. He is least likely to misbehave in Spanish class because the teacher is very animated.

Shows affection toward a female student: kissing in the mouth, hugging, holding hand. . . .

Does not observe cognitive delays, he is typically developing cognitively. He is meeting or surpassing the age equivalent Gold Standards for PS and PK. Mother reports that the doctor says he is developing at the rate of a 2 year old but his academic behavior does not support that.

[Student] was observed by the social worker. He reports that he is physically aggressive toward classmates. He has "predatory" behavior toward students. He has knocked over bookcases. He gets angry and can be combative. He has observed him unable to regulate his behaviors and he tends to shut down. He is very distractible. For example, he was unable to stay in a group for more than 5 minutes with adult supervision before he runs away. [Classroom teacher] requested an FBA to determine if he is acting out angrily when he doesn't get his way. Social worker also requests a social history to determine if there are any underlying problems that may be contributing to his behaviors.

Exhibit R-9.

10. At an IEP team on January 28, 2014, School Social Worker reported on his observation of Student and that Classroom Teacher requested that an FBA be conducted and that he requested a social history of Student to determine if there were any underlying problems that may be contributing to Student's behaviors. Classroom Teacher reported that Student had made improvement with writing. The OT provider stated she had not seen Student's behavior problems, maybe due to a smaller environment. Speech-Language Pathologist reported that she sees Student in a small group and he behaves very well. The IEP team decided that Student remained eligible for special education services as a child with OHI and that he would continue to receive 26.5 hours per week of Specialized Instruction and 30 minutes per week, each, of S/L and OT services. Exhibit R-7. There was no evidence of a revised IEP's being finalized at that meeting.

11. School Social Worker conducted an FBA of Student in March 2014. In his FBA report, School Social Worker identified the characteristics of the behavior interfering with Student's learning as,

He has difficulty sustaining attention and staying on task during non-preferred group activities. He is easily distracted and frequently hits and kisses other (female) students. His behaviors are highly disruptive and unsafe. [Student's] social/emotional/behavioral dysregulation is associated with his inconsistent school performance. Frequently [Student] is physically aggressive: He hits, kicks, spits, and punches other students and staff: He uses profanity when he's mad to express his anger. Often when he's disciplined for his misbehavior(s) he escalates rapidly to oppositional, defiance, and (exceedingly) becomes more destructive. He is very dangerous to himself and others. He destroys property by slamming doors, knocking over desks, and damaging rooms. Student is frequently non-compliant, unresponsive, to staff efforts at redirection. During nap time he doesn't sleep and tries to wake up the other students by deliberately making noises, throwing objects around the room and physically tries to wake them up. On some occasions he will attempt to abscond from the room.

School Social Worker reported that Student is more likely to become angry and become oppositional when he does not get 1:1 attention from staff or from his classmates and he is more likely to exhibit appropriate behaviors when he is receiving direct attention from adults. School Social Worker reported that Student lacks the ability to self regulate his behaviors, that he is highly impulsive and hyperactive in all settings, that his challenging behaviors interfere with his ability to interact, engage and play with other students in a safe manner. However, School Social Worker reported that Student's behaviors have not adversely impacted his academic performance. Exhibit P-29.

12. Prior to March 2014, Student received behavior support, and an intervention plan was developed and implemented by Classroom Teacher. Interventions included time outs, planned ignoring, proximity, buddy room, removal from class, directives given by teacher and behavioral support to de-escalate Student. Student was also allowed time away to calm down and de-escalate when he was frustrated. This strategy was reported to be moderately successful in helping Student to avoid experiencing a crisis event. Exhibit P-29.

13. On March 13, 2014, a BIP was drafted for Student which was intended to target his aggressive and non-compliant behaviors, including the use of a personal visual schedule, of a token system to reinforce targeted behaviors and of progressive steps by school staff to ward off unsafe and disruptive behaviors and to de-escalate Student. Exhibit P-30.

14. At a March 25, 2014 meeting to review the FBA and to develop a BIP, School Social Worker reviewed his FBA. In a review of the BIP, Classroom Teacher reported that Student was successful with an extra adult in the class, which was temporary. Exhibit R-10. School Social Worker stated that there needs to be a third

adult in Student's classroom because Classroom Teacher and the paraprofessional cannot work with all of the children and Student's behavior at the same time. At the meeting, Educational Advocate requested a dedicated aide for Student and was informed that a dedicated aide could not be provided until it was determined that Student's BIP was unsuccessful in managing his behaviors. Exhibit P-33.

15. Student's City School 2 IEP team met again on April 3, 2014 following the resolution session meeting (RSM) for this case. The IEP team discussed behavior interventions, applied behavior analysis and the parent's dedicated aide request. The team developed a revised IEP. In the April 3, 2014 IEP, the IEP team reported that Student's poor behavior and social skills were impeding his ability to access the curriculum and attend to tasks, and that Classroom Teacher had been unsuccessful with having Student comply with school rules and behavioral expectations. The IEP team reduced Student's Specialized Instruction Services from 26.5 to 26 hours per week and added 30 minutes per week of Behavioral Support Services to Student's IEP. The IEP states that all of Student's special education and related services are to be provided outside of the General Education setting. Exhibits R-12, P-4.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* 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

- a. Did DCPS deny Student a FAPE by repeatedly sending him home without convening a Manifestation Determination Review meeting or making an appropriate manifestation determination?

The IDEA protects disabled children from being removed from the classroom because of their disability. 34 C.F.R. § 300.530(e); 34 C.F.R. § 300.536(a). If a child suffers (1) a change of placement for (2) a disciplinary reason, then the school must conduct a manifestation determination to determine if the behavior resulted from the child's disability. *Id.* The first issue in deciding whether a manifestation determination is required is determining whether the disabled child has suffered a change of placement. A change of placement inquiry has two sub-parts: (1) whether the removal is for greater than ten consecutive school days or qualifies as a "pattern" of removals, and (2) whether the removal constitutes a foundational change in the student's education program. *See M.N. v. Rolla Public School Dist. 31*, 2012 WL 2049818, 4-5 (W.D.Mo.2012). In this case, Mother's testimony was un rebutted that since the beginning of the current school year, she has been called to take Student home from school on some 20 occasions because of his disruptive behaviors – fighting, disruption of class and running out of the classroom. I find that Mother has established that there was a pattern of removals which constituted a foundation change in Student's program.

After establishing that the removals constituted a change of educational placement, the second criteria for requiring a manifestation determination is whether the change of placement was for a code of conduct violation. *See* 34 C.F.R. § 300.530(e) (A manifestation determination must take place if there is a decision to "change the

placement of a child with a disability because of a violation of a code of student conduct.”); *M.N., supra*. Here, I find that Mother has not met her burden of proof. In the current school year, Student was formally suspended from school for only three days. On the other occasions that Mother was called to pick up the child, it appears that Student was sent home because Classroom Teacher was unable to manage his behaviors, which Mother was told were detrimental to his surroundings and to other Students. There was no evidence that Student was removed from school on those occasions for disciplinary reasons or because he violated a code of student conduct. I conclude, therefore, that Petitioner has not established that Student was removed from school, for code of conduct violations, for more than ten days in the current school year or that a manifestation determination review was required by the IDEA.

- b. Did DCPS deny Student FAPE by failing to fully, timely and comprehensively evaluate him in all areas of suspected disabilities?

The IDEA regulations require that, as part of a special education evaluation, the local education agency (LEA) must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). When conducting an evaluation, it is the responsibility of a child’s IEP team, on the basis of its review of existing data and input from the parent, to identify what additional data are needed to determine Student’s educational needs. *See* 34 CFR § 300.305(a)(2).

Student was initially evaluated for special education eligibility in July 2012. At

that time, he received an Educational Evaluation, a Psychological Evaluation, a Speech and Language Evaluation and an Occupational Therapy Evaluation. At the due process hearing, Petitioner's only evidence that Student had not been comprehensively evaluated came from Audiologist, the parent's expert in speech-language pathology and audiology. Audiologist testified that from his review of the 2012 S/L and OT evaluations of Student, the S/L evaluation was inadequate because it did not address receptive language and did not include a hearing test. He opined that the OT evaluation was likewise inadequate because it did not include a measure of hearing, auditory processing or auditory sensory evaluations. DCPS' expert, Speech Language Pathologist testified that Student has passed hearing requirements for purposes of speech intervention and no one has raised concerns about his hearing. She testified that based upon how Student responds to sound and to instruction, his hearing appears to be adequate. She further opined that an auditory processing assessment was not appropriate for Student and that the American Speech-Language-Hearing Association (ASHA) does not recommend auditory processing assessments for children, like Student, who are under age eight, because their brains are still developing.

Audiologist based his opinion that Student needed additional hearing and auditory processing assessments solely upon his review of Student's 2012 evaluations and his IEPs. Audiologist has never observed, or even met, Student and has not spoken with his teachers or service providers. I found that Audiologist's opinion was less credible than that of Speech and Language Pathologist, who has provided S/L services to Student this school year and has first hand knowledge of his needs and progress. Therefore, I find that Petitioner has not met her burden of proof to establish that Student requires an audiological or auditory processing assessment or other additional

assessments at this time.²

- c. Was Student's April 10, 2013 IEP inappropriate because it lacked appropriate math goals, one-to-one, applied behavioral analysis (ABA) services, counseling for anger management and oppositional defiance, assistance for redirection and assistance with focusing and behavior management, a dedicated aide, and extended school year (ESY) services?

Petitioner alleges in her due process complaint that Student's April 10, 2013 IEP, developed when Student attended City School 1, was inappropriate because of inadequate math goals, lack of behavioral support services, and no provision for a dedicated aide or ESY services. The IDEA requires that to provide a FAPE, "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). The IEP issues asserted by Petitioner in this case concern only the second prong of the inquiry.

The measure and adequacy of an IEP can only be determined as of the time it is offered to the student. *See S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d

² Mother is not precluded from requesting an eligibility reevaluation of Student. The IDEA requires that a reevaluation of each child with a disability is conducted at least once every three years and, with limitations, sooner, if the child's parent or teacher requests a reevaluation or if the LEA determines that the needs of the child warrant a reevaluation. *See* 34 CFR § 300.303.

56, 66 (D.D.C. 2008) (Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” *Id.*) Mother testified that when the April 10, 2013 IEP was developed, Student was doing very well at City School 1. At the IEP meeting, Student was reported to be progressing on his OT and S/L goals and he had been recently assessed in Adaptive/Daily Living Skills. The April 10, 2013 IEP team maintained the full-time Specialized Instruction, as well as the S/L and OT services, from Student’s August 16, 2012 IEP. I find that Petitioner has not shown that the IEP team’s decision to continue the services under which Student has progressed in the 2012-2013 school year was inappropriate. Neither has Petitioner shown that Student required ESY services. “ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *Johnson v. District of Columbia*, 873 F.Supp.2d 382, 386 (D.D.C.2012), quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537–38 (4th Cir.2002). Petitioner offered no competent evidence in this case that Student’s gains over the 2012-2013 school year would have been significantly jeopardized without the reinforcement of summer ESY services. I conclude that Petitioner has not shown that when the April 10, 2013 IEP was offered, it was not reasonably calculated to enable Student to receive educational benefits.

- d. Has DCPS denied Student a FAPE by failing to fully implement his April 10, 2013 IEP in the current, 2013-2014, school year by failing to provide all of the OT and S/L services and classroom accommodations and services specified in the IEP?

Petitioner contends that DCPS failed to implement Student’s April 10, 2013 IEP in the current school year because DCPS did not provide the hours of OT and S/L

services required by the IEP. (Petitioner offered no evidence on the claim that DCPS did not provide the classroom accommodations and services required by his IEP.) The standard for failure-to-implement claims, adopted in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000) and followed in this circuit, requires that a parent “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.” *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C.2013) (citations and internal quotations omitted.) With regard to the provision of S/L related services, Speech Language Pathologist testified that she had provided Student’s S/L services for the 2013-2014 school year and that Student had not missed any services. I did not find credible Mother’s testimony to the contrary that Student’s S/L services were not started until November 2013. I find that Petitioner has not established that DCPS failed to implement the S/L services required by Student’s IEP.

DCPS admits that from the beginning of the 2013-2014 school year until November 2013, DCPS did not provide OT services at City School 2. DCPS offered to make up these services for Student at an “OT Camp” over the 2014 spring break. Petitioner did not elect to avail Student of these services. I find that DCPS’ failure to provide Student OT services in the fall of 2014 (approximately four to six hours of missed services) was a failure to implement a significant provision of Student’s IEP. At the Resolution Session Meeting in this case, DCPS offered to make up Student’s missed

OT service hours and I will order DCPS to do so.

- e. Has DCPS failed to meet Student's need for a full-time, stand-alone special education placement?

Petitioner also contends that DCPS did not implement Student's April 10, 2013 IEP because, at City School 2, Student was not placed in a "full-time stand alone" placement. By full-time stand alone placement, Petitioner presumably means a "special school" serving only children with disabilities. See 34 CFR § 300.115 (Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services, to include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.) However in the April 10, 2013 IEP, Student's IEP team did not determine that he needed to be placed in a special school. The IEP only required that Student receive all of his Specialized Instruction and Related Services outside the General Education setting, *i.e.*, in special classes. The fact that Student was assigned to City School 1 – which was a special school – was not a requirement of his IEP. For the 2013-2014 school year, Student continued to receive all of his Specialized Instruction and Related Services in a special class within City School 2, outside the General Education setting, as required by his IEP.

Petitioner's Counsel cites the U.S. Department of Education Office of Special Education Programs' *Letter to Fisher*, 21 IDELR 992, 993 (OSEP 1994), in which the agency responded to a question from the Tennessee Department of Education as to whether a change in schools would constitute a change in placement for purposes of the notice and hearing provisions of the IDEA. OSEP wrote that, "the public agency responsible for educating the child must determine whether the proposed change would

substantially or materially alter the child's educational program. In making such a determination, the effect of the change in location on the following factors must be examined: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements." *Id.* The evidence in the present case is that when Student was assigned to City School 2, the educational program set out in his IEP was not revised; Student would continue not to be educated with nondisabled children; There was no evidence of any change in Student's opportunity to participate in nonacademic and extracurricular services; and the placement at City School 2, a special class, is the same option on the continuum of alternative placements provided in the City School 1 IEP. I find that Petitioner has not established that moving Student to City School 1 was a change of educational placement or constituted a failure to implement the special class placement required by the April 10, 2013 IEP.

Student's April 4, 2014 IEP continues Student's placement for all special education and related services in a special class, outside the General Education setting. The appropriateness of this IEP, which was developed after the parent's due process complaint was filed, is not at issue in this proceeding. Notwithstanding, I note that the evidence in this case, from the written reports of DCPS' employees, establishes that Student's 2013-2014 classroom setting has not met his educational needs, even though the placement was appropriate when determined by the April 10, 2013 IEP team at City School 1. In March 2014, the City School 2 social worker reported, *inter alia*, that Student's behaviors are highly disruptive and unsafe; that he frequently is physically

aggressive, hitting, kicking, spitting at and punching other students and staff; that he destroys property by slamming doors, knocking over desks, and damaging rooms and that he is very dangerous to himself and others. *See* Exhibit P-29. The hearing evidence also establishes that the current classroom staffing – a teacher and a paraprofessional for eight children – is not sufficient to manage Student’s behaviors, but that Student’s behavior improved with an extra adult in the classroom and more 1:1 attention. The IDEA requires DCPS to ensure that Student’s IEP team periodically revises his IEP, as appropriate, to address, *inter alia*, any lack of expected progress toward his annual goals, the results of his FBA and other reevaluations, information from teachers and the parent and the child’s anticipated needs. *See* 34 CFR § 300.324(b). Even though the question of whether the April 3, 2014 IEP is appropriate for Student is not before me in this case, I exhort DCPS to ensure that the new IEP is promptly reviewed and revised, as appropriate, in light of the evidence at the due process hearing of Student’s current educational and behavioral needs, particularly the inability of Student’s special education teacher to manage his behaviors with the existing classroom staffing.

ORDER

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

1. DCPS is order to make up the missed Occupation Therapy services not provided to Student between August and November 2013. The services shall be completed no later than the end of DCPS’ 2014 summer school session at a location and on a schedule as may reasonably be agreed upon by Petitioner;
2. All other relief requested by Petitioner in this case is denied, without prejudice to Petitioner’s rights hereafter to seek redress for any alleged denial of FAPE

to Student under the April 3, 2014 IEP.

Date: May 9, 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).