

**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 20, 2013

STUDENT,¹

Petitioner,

Date Issued: May 20, 2013

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner, an adult student (the “Petitioner” or “Student”), 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, Student alleges that her March 2012 and January 2013 Individualized Education Programs (“IEPs”), developed by Respondent District of Columbia Public Schools (“DCPS”), were inappropriate, resulting in denial of a Free Appropriate Public Education (“FAPE”).

¹ Personal identification information is provided in Appendix A.

Student, an AGE adult, is a resident of the District of Columbia. Her Due Process Complaint, filed on March 18, 2013, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 19, 2013. The record does not establish whether the parties met for a resolution session. The 45-day deadline for issuance of this Hearing Officer Determination began on April 18, 2013. On April 10, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on May 13, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called MOTHER, ADMISSIONS COORDINATOR and CLINICAL PSYCHOLOGIST as witnesses. DCPS called CASE MANAGER as its only witness. Petitioner's Exhibits, P-1 through P-9 and P-14 through P-26, were admitted into evidence without objection. DCPS' Exhibits R-1 and R-2 were admitted into evidence without objection. Counsel for both parties made opening and closing statements.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS' JANUARY 15, 2013 IEP DENIES STUDENT A FAPE BECAUSE IT PROVIDES HER WITH ONLY 6.5 HOURS OF SPECIALIZED INSTRUCTION SERVICES OUTSIDE OF GENERAL EDUCATION AND 13.5 HOURS OF SPECIALIZED INSTRUCTION IN THE GENERAL

EDUCATION SETTING;

- WHETHER THE JANUARY 15, 2013 IEP TRANSITION GOALS AND SERVICES ARE INAPPROPRIATE BECAUSE DCPS HAS NOT CONDUCTED A VOCATIONAL ASSESSMENT OF STUDENT;
- WHETHER THE JANUARY 15, 2013 IEP IS INAPPROPRIATE FOR STUDENT BECAUSE IT DOES NOT IDENTIFY EMOTIONAL DISTURBANCE AS AN ADDITIONAL DISABILITY CLASSIFICATION; and
- WHETHER DCPS’ MARCH 1, 2012 IEP DENIED STUDENT A FAPE BECAUSE IT DID NOT MEET HER REQUIREMENT FOR FULL-TIME SPECIALIZED INSTRUCTION IN A THERAPEUTIC, OUTSIDE OF GENERAL EDUCATION, ENVIRONMENT.

For relief, Student requests that DCPS be ordered to fund her prospective private placement at NON-PUBLIC SCHOOL. In addition, Student seeks an award of compensatory education to compensate her for alleged educational harm resulting from DCPS’ failure to provide her full-time special education in a non-general education setting since the March 2012 IEP.

FINDINGS OF FACT

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

1. Student, an age adult, resides in the District of Columbia, where she lives with Mother. Testimony of Mother.
2. Student was first determined eligible for special education services in March 2004 as a Learning Disabled (“LD”) student. Student’s first IEP was, reportedly, developed by Prince Georges County, Maryland Public Schools. Exhibit P-5. Student was last determined eligible for special education and related services on January 11, 2013, under the primary disability classification Other Health Impairment (“OHI”). Exhibit P-15.
3. In Student’s first DCPS IEP, developed August 11, 2005 at FIRST CITY

ELEMENTARY SCHOOL, her disability was reported to be LD. The IEP included annual goals for Reading and Written Expression and provided 10 hours per week of Specialized Instruction in a special education setting. Exhibit P-5.

4. In a March 20, 2007 IEP, developed at SECOND CITY ELEMENTARY SCHOOL, Student's disability was again reported to be LD. This IEP included annual goals for Reading, Math, and Language Arts. The school social worker reported that Student continued to have difficulty with her peers and adults, and that the social worker would continue to provide Student with individual and group counseling sessions to assist with her behavior. The Least Restrictive Environment ("LRE") section of the IEP reported that Student required a small structured environment to accommodate her disabilities. The March 20, 2007 IEP team determined that Student required 15 hours per week of Specialized Instruction, outside the general education setting, and 30 minutes per week of school counseling. Exhibit P-3.

5. In February 2008, DCPS conducted an educational reevaluation of Student. The examiner administered the Woodcock-Johnson Tests of Achievement Third Edition Form A ("WJ-III ACH"). The examiner reported that Student's overall level of achievement was low average. When compared to others at her grade level, Student's performance was average in reading comprehension; low average in broad reading, basic writing skills and written expression; low in mathematics; and very low in math calculation skills. Exhibit P-4.

6. In a June 2, 2008 psychological evaluation, conducted for Student's triennial reevaluation, DCPS' psychologist administered a battery of cognitive and behavior assessment tests. Student's results on the Mental Status Exam ("MSE") indicated that her ability to focus on and attend to information was below age/grade level. On the Wechsler Abbreviated Scale of Intelligence ("WASI"), results indicated that Student's overall reasoning, thinking, and problem

solving abilities were below average. On the Wechsler Intelligence Scale for Children (“WISC-4”), Student’s verbal reasoning abilities, as measured by the Verbal Comprehension Index, were in the Borderline range. Her nonverbal reasoning abilities, measured by the Perceptual Reasoning Index, were statistically in the Average range, but still below those of approximately 75% of her peers. Her Working Memory score was in the Extremely Low Range, as was her Processing Speed. Student’s score on the Bender Visual Motor Gestalt Test (“BVMGT”) indicated that her ability to write may have been as much as four years delayed. The indicators gleaned from Student’s BVMGT drawings suggested the possibility that she was coping with a neurological impairment. The Draw-a-Person (“DAP”) test indicated to the examiner the possibility that Student was coping with an organic problem. The Behavior Assessment System for Children – 2nd Edition (“BASC-2”) results, based upon questionnaire responses from Student and a teacher, indicated that Student was exhibiting many of the behaviors attributed to Attention Deficit Hyperactivity Disorder (“ADHD”). The DCPS examiner recommended that Student should continue to be eligible for special education under the LD primary disability classification. He also recommended that Student should continue to participate in counseling to help her cope with behavioral issues. Exhibit P-6.

7. Student began attending CITY HIGH SCHOOL in the fall of 2010-2011. In the current school year, she is repeating Grade for the third time. Testimony of Student.

8. For school year 2010-2011, Student received F grades in all subjects. The report card reported 109 days absent and only 57 days present. Exhibit P-21.

9. Student’s March 1, 2012 City High School IEP contained annual goals for Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. For the academic areas of concern, the IEP team reported that Student’s lack of focus/motivation

had seriously impacted her success at school. The IEP team further reported that Student had tendencies to be non-compliant, easily distracted and impulsive. Behavioral Support counseling was provided to reduce oppositional behavior and defiance toward adults. The IEP provided 13 hours per week of Specialized Instruction in the general education classroom and 30 minutes per week of Behavioral Support Services. Outside general education instruction was not offered due to “impact on [Student’s] self esteem and because she does not qualify.” Exhibit P-2.

10. On March 26, 2012, Student was evaluated by LICENSED INDEPENDENT CLINICAL SOCIAL WORKER (“LICSW”) upon referral by Mother. LICSW’s only sources of information were reports from Student and Mother. Based upon Student’s admitting to losing her temper often, to frequently arguing with adults, to defying or refusing to comply with adults’ requests, to being often “touchy” or easily annoyed by others and to often blaming others for her mistakes or misbehaviors, LICSW concluded that Student met the criteria for Oppositional Defiant Disorder (“ODD”). LICSW also noted that Student exhibits cognitive deficits that impact her functioning in school and at home, and that she demonstrates impulsive, aggressive behavior that warrants clinical attention. LICSW recommended that further assessment was needed to determine if any learning disorders exist and if Student’s perceived impulsivity is the result of an attention deficit disorder. Exhibit P-20.

11. For school year 2011-2012, Student received F grades in all subjects, except for a C in Computer Applications I and a D in Algebra I. The report card reported 66 days absent and 114 days present. By the end of the school year, Student had earned only 1.5 credits toward high school graduation. Exhibit P-21.

12. On September 2, 2012 another impartial hearing officer issued a Hearing Officer Determination (the “September 2, 2012 HOD”) in a prior case filed on behalf of Student. In that

decision, the hearing officer, *inter alia*, ordered DCPS to provide a psychological evaluation of Student and to review and revise her IEP. See Exhibit P-16. (“Psychological evaluation was reviewed at January 11, 2013 meeting. Team begins with the remainder of the HOD requirements, which is to review and revise IEP.”) The September 2, 2012 HOD was not mentioned by counsel or offered as an exhibit at the due process hearing in the present case.

13. Pursuant to the September 2, 2012 HOD, a Comprehensive Psychological Evaluation was conducted on September 15, 2012. In the November 5, 2012 Comprehensive Psychological Evaluation report, SUPERVISING PSYCHOLOGIST reported that Cognitive Testing showed Student’s General Intellectual Ability (“GIA”) index is in the borderline range of function at the 8th percentile. On the WJ-III Achievement tests, Student’s scores reflected that she was functioning below expectations for her age and grade level. Her reading scores were in the low average range. Oral Language scores were in the low average or average range. Her math reasoning, problem solving, number facility and automaticity were in the borderline range. Written language achievement was also in the borderline range. Social-emotional testing and interviews suggested maladjusted social functioning with significant areas of concern. These included poor peer relations, rule breaking, severe conduct problems, and an inability to sufficiently regulate her behavior and emotions. The report states that Student’s emotional and behavioral issues affect her social functioning and judgment and that, as a result, her academic performance, interpersonal relationships, and home life are severely impacted. Exhibit P-19.

14. Supervising Psychologist concluded that Student met the symptom criteria for Mathematics Disorder, Disorder of Written Expression and Oppositional Defiant Disorder. He opined that these data supported disability classifications of LD and Emotional Disturbance. Exhibit P-19.

15. Supervising Psychologist strongly recommended that Student receive special education programming in a full-day separate therapeutic educational environment. He recommended, *inter alia*, small classes of less than 10 students, low staff to student ratios [*sic*], certified Special Education teachers and credentialed staff trained to work with attention and social/emotional behavior disorders, daily individualized academic support, and parent involvement. Supervising Psychologist also recommended, *inter alia*, that Student be evaluated for ADHD and a Functional Behavioral Assessment (“FBA”) to identify the target behaviors that interfere with Student’s daily learning. Exhibit P-19.

16. Student’s Multidisciplinary Team (“MDT”) met at City High School on January 11, 2013. SCHOOL PSYCHOLOGIST recommended that Student’s disability classification be changed to OHI because of Student’s prior ADHD. He opined that Student’s disability was not so severe that City High School could not service her needs. Petitioner’s Counsel disagreed and stated that Mother believed that Student had OHI, with LD and ED. Exhibit P-18.

17. Pursuant to the September 2, 2012, HOD, Student’s IEP team reviewed her IEP on January 15, 2013. The IEP team meeting notes state that the purpose of the meeting was to “comply with the September 2, 2012 HOD, which states that DCPS will review/revise IEP as warranted.” In the IEP description of how Student’s disability affects her academic progress, the IEP team reported that Student’s assessments, anecdotal notes, and unwillingness to perform/participate show that she is below basic in math, reading and written expression². This was reported to impact Student’s ability to succeed in the classroom. Student was reported not likely to comply with any directives to attend class or academic tasks, because Student is trying

² The IEP team drafted identical descriptions of how Student’s disability affects her progress for mathematics, reading and written expression. In what I assume was a typographical error, the IEP reports, in the written expression section that Student is below basic in math. See Exhibit P-15, page 5.

to avoid dealing with her deficiencies. In the Emotional, Social and Behavioral Development section of the IEP, the team reported that Student has tendencies to be non-compliant. The IEP objectives were to increase Student's self-confidence through participation in behavioral support counseling and to reduce oppositional behavior. Student's special education and related services were increased in the January 15, 2013 IEP to 13 hours per week of Specialized Instruction in the General Education setting, 6.5 hours per week of Specialized Instruction Outside General Education and 45 minutes per week of Behavioral Support Services Outside General Education. Exhibit P-15. The Specialized Instruction, outside general education, was to be provided in a daily learning lab class. Exhibit P-18.

18. Most of the January 15, 2013 IEP team members believed that Student's lack of progress in school was due to her behavior issues. The IEP team did not discuss developing a Behavior Intervention Plan ("BIP") for Student. Testimony of Case Manager.

19. In the January 15, 2013 IEP, Student was reported to continue to struggle with attendance. In the 2012-2013 school year, she was reported to have been absent for 42 days and present for only 34.5 days. Exhibit P-15.

20. Student's emotional outbursts at school have declined over the current school year. Testimony of Case Manager.

21. The post-secondary transition plan for Student in the January 15, 2013 IEP is based upon a January 8, 2013 Educational Assessment conducted by the City High School Transition Coordinator. The Transition Coordinator attended the IEP meeting. Exhibit P-15.

22. Case Manager teaches Student's daily learning lab class. The class meets for 85 minutes daily. There are 5 students in Learning Lab who attend on a daily basis. Individualized instruction is provided. The learning lab class has a reward/incentive program to encourage

desired behaviors. Student is failing the class. Student's biggest obstacle is poor attendance.

Testimony of Case Manager.

23. As of May 7, 2013, Student was reported to have been present for only 71 out of 149 days in the 2012-2013 school year, and had accumulated 263 unexcused absences. Exhibit R-1.

24. The 13 hours of Specialized Instruction in the general education setting specified in Student's IEP are provided in a classroom with up to 30 students, co-taught by two teachers.

Testimony of Case Manager.

25. Non-Public School, located in suburban Maryland, serves children mostly with social and emotional disabilities. Students at Non-Public School do not have interaction with non-disabled peers. All Students at Non-Public School receive individual and group therapy. The school offers small classroom size taught by special education teachers. Non-Public School has a current Certificate of Approval from the D.C. Office of the State Superintendent of Education ("OSSE"). The annual tuition cost is approximately \$40,000. Testimony of Admissions Coordinator.

26. At Non-Public School, school staff will work with the family and with DCPS to get its students to come to school. Admissions Coordinator did not identify any formal attendance plan or protocol used by the private school for Students with severe school attendance problems. Testimony of Admissions Coordinator.

27. Student and Mother have visited Non-Public School and toured the facility. They spent time with Admissions Coordinator and other school staff. In the opinion of Admissions Coordinator, Student shows potential to receive educational benefit at Non-Public School and Student has emotional needs which Non-Public School would be able to meet. Student has been

offered admission by the school. Testimony of Admission Coordinator.

28. Student wants to go to Non-Public School. She believes that in the small classroom environment at Non-Public School, she would be better able to focus. Testimony of Student.

29. Clinical Psychologist did not separately interview Student. She has not observed Student at school or interviewed Student's teachers, counselors or other service providers. She conducted no testing of Student and did not develop her own formulation of Student's behavioral or educational needs. Clinical Psychologist met Mother and Student for the first time the week before the due process hearing. In that 90 minutes interview with Mother and Student, Mother did most of the talking. Testimony of Clinical Psychologist.

CONCLUSIONS OF LAW

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

Burden of Proof

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

ANALYSIS

1. DOES DCPS' JANUARY 15, 2013 IEP DENY STUDENT A FAPE BECAUSE IT PROVIDES HER WITH ONLY 6.5 HOURS OF SPECIALIZED INSTRUCTION SERVICES OUTSIDE OF GENERAL EDUCATION AND 13.5 HOURS OF SPECIALIZED INSTRUCTION IN THE GENERAL EDUCATION SETTING?

Petitioner contends that the January 15, 2013 IEP, which continues her placement at City High School and provides most of her special education services in the general education setting, is inappropriate, because it does not adequately address her absence of expected progress under her prior IEPs or the findings of the November 5, 2012 Comprehensive Psychological Evaluation. I agree.

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. *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). The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could

discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985). See *Rowley, supra*, 458 U.S. at 200 (Requirement that the education to which access is provided be sufficient to confer “some educational benefit” upon the handicapped child.) “[A] plan for a severely handicapped student will satisfy the IDEA only if it is likely to produce progress, not regression or trivial educational advancement.” *M.C. on Behalf of J.C. v. Central Regional School Dist.*, 81 F.3d 389, 393 (3rd Cir.1996). See, also, *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 168 (D.D.C.2005) (“*de minimis* benefits” are insufficient to satisfy *Rowley*'s “some educational benefit” standard.) A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. See 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir.2005)).

An IEP must be amended if its objectives are not met, 20 U.S.C. § 1414(d)(4). *Loren F. ex rel. Fisher v. Atlanta Independent School System*, 349 F.3d 1309, 1312 (11th Cir. 2003). “[A]cademic progress is an ‘important factor’ among others in ascertaining whether the student's IEP was reasonably calculated to provide educational benefit.” *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 642 (8th Cir. 2003) citing *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034. See, also, *Iapalucci, supra*, 402 F.Supp.2d at 168 (Highly relevant whether student was making progress and experiencing meaningful educational benefit from the IEP.)

This school year, Student is repeating GRADE at City High School for the third time. She failed almost all of her courses the first two years and is doing no better this school year. DCPS' March 1, 2012 IEP for Student apparently produced no educational progress at all. In the

September 2, 2012 HOD, following Student's unsuccessful 2011-2012 school year, the hearing officer ordered, *inter alia*, that a psychological reevaluation of Student be conducted and that DCPS convene Student's IEP team to review and revise her IEP. In the November 5, 2012 independent comprehensive psychological reevaluation report, Supervising Psychologist reported that because of her impulsive behaviors, defiance, inattention and poor concentration, Student lacked sufficient internal resources to support herself and effectively cope with stressors. He recommended that Student needed to be taught in small classes with a low student-to-teacher ratio.

When Student's IEP team met on January 15, 2013, the team was required by the IDEA to consider, *inter alia*, the psychological reevaluation as well as Student's lack of progress under the March 1, 2012 IEP. The IEP team reported in the 2013 IEP, identically to the 2012 IEP, that Student's assessments, anecdotal notes, and unwillingness to perform/participate impacted Student's ability to succeed in the classroom, and, in fact, Student was "below basic" in math, reading and written expression. Despite the evidence of Student's lack of progress or educational benefit from the March 2012 IEP, and contrary to the recommendations of Supervising Psychologist, when the IEP team met in January 2013, it left Student's March 2012 IEP essentially unchanged, except for the addition of 6.5 hours per week of pull-out services and an increase of 15 minutes per week in behavioral support services. The academic goals from the March 1, 2012 IEP were largely carried over, in most cases verbatim, to the January 15, 2013 IEP.

I find that the January 15, 2013 was not reasonably calculated to provide educational benefit to Student. Case Manager, called by DCPS, opined that the services offered in the January 2013 IEP are sufficient to provide educational benefit to Student, but that Student's

school attendance problem is an obstacle to her making progress. I found Case Manager to be a credible witness. She knows Student, both as her case manager and as her teacher. She has observed Student in the classroom and is a member of Student's IEP team. Notwithstanding, I discount Case Manager's opinion as to the appropriateness of Student's IEP because she ignores DCPS' obligation in the IEP to address Student's truant and disruptive behaviors.

Congress recognized in the IDEA that "social and emotional problems are not *ipso facto* separable from the learning process." *Indept. School Dist. No. 284 v. A.C.*, 258 F.3d 769, 776–77 (8th Cir.2001). The IDEA requires, in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i). In *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F.Supp.2d 18 (D.Me.2005), the Court considered a case of a student who had an "extensively documented" array of difficulties, particularly problems with attendance. The Court held that the Local Education Agency's ("LEA") IEP, which failed to address in some fashion student's persistent absence and tardiness, could not be "adequate and appropriate." *Id.* at 34. *See, also, Lauren P. ex rel. David P. v. Wissahickon School Dist.*, 2007 WL 1810671, 7 (E.D.Pa.2007), *rev'd in part on other grounds*, 310 Fed.Appx. 552, 2009 WL 382529 (3rd Cir. 2009) (LEA's inconsistency of approach to Student's behavioral problems, including lateness, absences, and failure to complete assignments, resulted in denial of FAPE.) In *Harris v. District of Columbia*, 561 F.Supp.2d 63 (D.D.C.2008), the Court explained that "the IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." *Id.* at 68. *See, also, Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011) (DCPS' failure to complete a Functional Behavioral Assessment and Behavior Intervention Plan, when warranted, will

constitute a denial of a FAPE.)

In this case, Student's January 15, 2013 IEP team was well aware that Student's behavior and attendance problems impeded her learning. The IEP team recognized, in both the March 2012 IEP and the January 2013 IEP, that Student's unwillingness to perform/participate impacted her ability to succeed in the classroom. Case Manager testified that the "biggest obstacle" to Student's improvement in school was her attendance. In his November 5, 2012 evaluation, Supervising Psychologist reported that Student's academic performance was "severely impacted" by, *inter alia*, her difficulty with impulsive behaviors, defiance, inattention and poor concentration. He recommended that Student receive a Functional Behavioral Assessment to identify her target behaviors and a Behavior Intervention Plan to aid in addressing those behaviors. Notwithstanding, the January 15, 2013 IEP omits a Behavior Intervention Plan and lacks any goals, interventions or services expressly to support Student's school attendance. I find that the IEP could not be considered "adequate and appropriate," *see Lamoine, supra*, or reasonably calculated to provide educational benefit. Consequently, Student has been denied a FAPE. Petitioner prevails on this issue.

2. ARE THE JANUARY 15, 2013 IEP TRANSITION GOALS AND SERVICES INAPPROPRIATE BECAUSE DCPS HAS NOT CONDUCTED A VOCATIONAL ASSESSMENT OF STUDENT?

Petitioner contends that DCPS has denied Student a FAPE by not conducting a vocational assessment after Student reached her 16th birthday. The IDEA requires that, beginning not later than the first IEP to be in effect when a student turns 16, the student's IEP must include post-secondary goals and transition services (including courses of study) needed to assist the student in reaching those goals. Transition services include, "if appropriate," the provision of a functional vocational evaluation. 34 CFR §§ 300.320(b), 300.43. Student is now over 18 years old. As with all special education and related services, the student's IEP Team

determines the transition services that are needed to provide FAPE to a child with a disability based on the needs of the child. *See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes*, 71 Fed. Reg. 46579, 46596 (August 14, 2006). The January 15, 2013 IEP indicates that Student's transition plan was based upon a January 8, 2013 Educational Assessment conducted by the City High School Transition Coordinator. The Transition Coordinator also attended the IEP meeting. Petitioner has not shown that when her IEP team met on January 15, 2013, a vocational assessment was needed or appropriate as part of her transition services. Petitioner has not met her burden of proof on this issue.³

3. IS THE JANUARY 15, 2013 IEP INAPPROPRIATE FOR STUDENT BECAUSE IT DOES NOT IDENTIFY EMOTIONAL DISTURBANCE AS AN ADDITIONAL DISABILITY CLASSIFICATION?

In his November 5, 2012 Comprehensive Psychological Evaluation, Supervising Psychologist reported that the information gathered in the evaluation suggested that Student met the symptom criteria for Oppositional Defiant Disorder and that his data supported disability classifications of LD and ED. In prior IEPs Student's primary disability was identified as LD or SLD. On the recommendation of School Psychologist, the January 15, 2013 IEP team changed Student's disability classification to OHI, based upon her history of ADHD. Student contends that the IEP is inappropriate because it does not also identify ED as a disability classification. However, so long as Student is eligible for special education services, whether or not her disability is classified as ED in the IEP is immaterial. A student's entitlement under the IDEA is

³ The failure to conduct a required evaluation would be a procedural violation of IDEA. An IDEA claim is viable only if the alleged procedural violation affected the student's substantive rights. *See Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). Petitioner offered no evidence that she suffered an "educational harm" resulting in denial of FAPE from DCPS' not conducting a vocational assessment. *See, e.g., Taylor v. District of Columbia* 770 F.Supp.2d 105, 109-110 (D.D.C.2011).

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). Although, in this decision I have found that Student has been denied a FAPE by the January 15, 2013 IEP, the IEP team's decision to classify her disability as OHI, and not also ED, is immaterial. DCPS prevails on this issue.

4. DID DCPS' 2012 IEP DENY STUDENT A FAPE BECAUSE IT DID NOT MEET HER REQUIREMENT FOR FULL-TIME SPECIALIZED INSTRUCTION IN A THERAPEUTIC, OUTSIDE OF GENERAL EDUCATION, ENVIRONMENT?

Student contends that her March 1, 2012 IEP also denied her a FAPE because it did not offer her full-time special education programming in a therapeutic setting.⁴ The 2012 IEP provided Student 13 hours per week of Specialized Instruction in the General Education setting and 30 minutes per week of Behavioral Support Services. Generally, an IEP is reviewed prospectively – not in hindsight. As the U.S. District Court for the District of Columbia has observed, “[b]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the [IDEA] nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008).

⁴ In the September 2, 2012 HOD, the hearing officer ordered DCPS to convene Student's IEP team to review and revise her IEP, after obtaining a psychological reevaluation. Although the September 2, 2012 HOD is not in evidence, I infer that the hearing officer must have considered and addressed the appropriateness of Student's 2012 IEP in the prior case.

In this case, Petitioner has not shown that when the March 1, 2012 IEP was offered to her, it was not reasonably calculated to provide educational benefit or that she required placement in a full-time special education setting. Although Student had failing grades for her entire tenure at City High School, there was no evidence that her 2011-2012 grades were attributable to an inadequate IEP. *See M.M. ex rel. Matthews v. Government of Dist. of Columbia*, 607 F.Supp.2d 168, 174 (D.D.C.2009) (IDEA does not guarantee any substantive outcome.) The only assessments offered into evidence by Petitioner, which pre-dated the March 1, 2012 IEP meeting, were a February 2008 Educational Evaluation and a June 2008 psychological evaluation. Neither of these assessments supports Student's alleged need for a full-time special education setting. Moreover, under the IDEA's Least Restrictive Environment requirement, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled" and "[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2). I find, therefore, that Petitioner has not met her burden of proof to establish that at the time the March 1, 2012 IEP was developed, she required removal from the regular educational environment or that the IEP was not reasonably calculated to provide educational benefit. DCPS prevails on this issue.

Remedy for Denial of FAPE in 2013 IEP

i. *Prospective Non-Public Placement*

In this decision, I have found that DCPS' January 15, 2013 IEP was not reasonably calculated to provide Student educational benefit. As a remedy, Petitioner seeks an order for DCPS to fund her private placement at Non-Public School. The failure of DCPS to offer Student

an appropriate IEP does not, *ipso facto*, entitle 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, supra*, 427 F.3d at 9. 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. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student’s Disability

In Student’s November 5, 2012 Comprehensive Psychological Evaluation, Supervising Psychologist concluded that Student met the symptom criteria for Mathematics Disorder, Disorder of Written Expression and Oppositional Defiant Disorder. He opined that these data supported disability classifications of LD and Emotional Disturbance. Student’s MDT/IEP team decided in January 2013, that Student’s primary disability should be OHI due to her ADHD history. Student is currently enrolled in Grade at City High School for the third year. She is not regularly attending school and her non-attendance is the principle obstacle to her making progress.

b. Student’s Specialized Educational Needs

I found Case Manager’s testimony credible that the primary obstacle to Student’s educational progress is her chronic school attendance problem. As of May 7, 2013, Student was reported to have been present for only 71 out of 149 school days and had accumulated 263

unexcused absences in the 2012-2013 school year. I find unpersuasive the opinions of Supervising Psychologist and Clinical Psychologist that Student needs to be placed in a full-time therapeutic special education program. Supervising Psychologist was not offered as a witness at the May 13, 2013 due process hearing and was not established to be an expert in education. I find that the opinions of Clinical Psychologist, who testified at the hearing, merit little weight. First, she was not qualified as an expert in education of children with disabilities. Second, Clinical Psychologist's opinions lacked a satisfactory foundational basis. Clinical Psychologist did not separately interview Student. She has not observed Student at school or interviewed Student's teachers, counselors or other service providers. She conducted no testing of Student and did not develop her own formulation of Student's behavioral or educational needs. Clinical Psychologist met Mother and Student for the first time the week before the due process hearing. In that 90 minutes interview with Mother and Student, Mother did most of the talking.

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

Non-Public School serves students with social and emotional disabilities. All students at Non-Public School receive individual and group therapy. The school offers small class size taught by special education teachers. Non-Public School would therefore meet most of the instructional setting criteria recommended for Student by Supervising Psychologist. However, I find no nexus between the services offered by Non-Public School and Student's chronic non-attendance problems, which the evidence establishes is the principle impediment to Student's receiving educational benefit at City High School. Aside from affirming that the private school would work with the family and DCPS to encourage Student to attend school, the representative from Non-Public School identified no intervention plan or attendance regime employed by the private school, that would be likely to overcome this adult student's non-attendance pattern. In *Presely v. Friendship Public Charter School*, 2013 WL 589181 (D.D.C. 2013), U.S. Magistrate

Judge Robinson recommended that the District Court uphold the due process hearing officer's finding that the evidence did not establish any link between the student's IEP goal to improve her class attendance and the services offered by the private school. *See, id.* at 9-10. In the present case, I find that Petitioner has, similarly, not shown how the services offered by Private School would be reasonably calculated to overcome her long-standing school attendance issues.

d. Cost of Placement at Private School

Tuition expenses at Non-Public School are approximately \$40,000 per year. DCPS offered no evidence that the cost of placement at Non-Public School is unreasonable or higher than costs at other regional private day schools serving DCPS students with disabilities.

e. Extent to Which Private School Represents Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5), 34 CFR § 300.550, D.C. Regs. tit. 5, § 3011 (2006)). "In determining the least restrictive environment, consideration is given to the types of services that the child requires." *Id.* (citing 34 C.F.R. § 300.552(d)). Supervising Psychologist recommended in the November 5, 2012 Comprehensive Psychological Evaluation that Student needed instruction in small classes of less than 10 students, taught by a special education teacher, and this recommendation was not rebutted by DCPS. However the evidence does not support a finding that Non-Public School, where Student would have no interaction with non-disabled peers, is the least restrictive environment possible for Student.

Considering all of the above *Branham* factors, but especially my finding that the program at Non-Public School is not reasonably calculated to address Student's school attendance issues, I conclude that Non-Public School is not an appropriate placement for Student. Accordingly, I will not order public funding of Student's placement at the private school.

ii. Compensatory Education

Once a student has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake “a fact-specific exercise of discretion” designed to identify those compensatory services that will compensate the student for that denial. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a child might have shown if she had received the required special education services, and the type and amount of services that would place the child in the same position she would have occupied but for the LEA’s violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005)).

Petitioner seeks an award of compensatory education to compensate for DCPS’ alleged denial of FAPE, after the March 1, 2012 IEP was developed. However, I have found Petitioner did not meet her burden of proof to establish that the March 1, 2012 IEP denied her a FAPE. Petitioner has established that DCPS’ January 15, 2013 IEP was not reasonably calculated to provide her meaningful educational benefit. Specifically, the IEP team failed to offer Student a placement which reflected consideration of Supervising Psychologist’s recommendation for small classroom size and a low student-to-teacher ratio and failed develop an intervention plan calculated to address Student school attendance and behavioral issues. I will order DCPS to reconvene Student’s IEP team to revise Student’s IEP to meet her educational and emotional/behavioral needs. Student is also entitled to compensatory education for DCPS’ failure to provide her a program reasonably calculated to provide educational benefit during the spring

2013 school term.

I have reviewed Clinical Psychologist's Compensatory Education Plan (Exhibit P-22). Clinical Psychologist recommends that Student be awarded some 300 hours of 1:1 tutoring in reading, math and writing. I find that this recommendation is entitled to no weight. Psychologist was not qualified as an expert in education and no foundation was established for her opinion as to the education harm resulting from DCPS' denial of FAPE to Student, or the appropriate educational services needed to compensate the Student for that denial. Clinical Psychologist also recommends 20 hours of 1:1 mentoring with a positive role model from the community, as a "new modality" that "may spark [Student's] interest and enthusiasm." *Id.* at p.4. Although role-model mentoring might well be beneficial to Student, I find that this service is not calculated to place Student in the position she would have occupied, but for DCPS January 2013 failure to develop an appropriate IEP for her.

The end of the 2012-2013 school year is approaching and it is unlikely that after Student's IEP is revised, it can be implemented prior to beginning of the 2013-2014 school year. I find it appropriate, therefore, to order compensatory relief to be delivered to Student over the DCPS summer break. Case Manager, whom I found to be a credible witness, testified that City High School's Learning Lab, which was offered to Student for 85 minutes per day, five days per week, was appropriate for Student because it provided individualized instruction based on a student's current levels of educational performance. Separately, Supervising Psychologist recommended in the November 5, 2012 psychological evaluation that Student receive tutoring as additional assistance and individualized attention in math and written expression. Taking account of these opinions/recommendations, I find that an appropriate compensatory education remedy for DCPS' denial of FAPE in the January 15, 2013 IEP would be an award of 1:1 tutoring during DCPS' summer school session, 85 minutes per day, in math, written expression

and other academic areas as may be identified as appropriate by Student and DCPS.

ORDER

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

1. Within 10 school days of the date of this order, DCPS shall, subject to obtaining Student's consent, initiate a Functional Behavioral Assessment designed to determine the reasons behind Student's truant and disruptive school behaviors. Results of this assessment shall be utilized by Student's IEP team to develop an appropriate Behavior Intervention Plan to support Student's school attendance and appropriate in-school behavior;
2. Within 15 calendar days of completion of the FBA, DCPS shall convene Student's IEP Team to revise and update Student's IEP. The IEP team shall fully consider the November 5, 2012 comprehensive psychological findings and recommendations of Supervising Psychologist, and shall offer Student a placement for the 2013-2013 school year, in a public or private school setting, that reasonably comports with Supervising Psychologist's recommendations for small class size, low student to teacher ratio, and individualized teaching support by staff trained to work with Students who have attentional and social/emotional behavior disorders. The IEP team shall also develop a Behavior Intervention Plan based upon the FBA conducted pursuant to this order;
3. As compensatory education, DCPS shall provide Student 1:1 academic tutoring, by a qualified instructor, 85 minutes per day, on a schedule that corresponds to DCPS' July 1 through August 2, 2013 summer school schedule. The content and details, including time and location, of the tutoring sessions shall be worked out between DCPS and Student; and
4. All other relief requested by the parties herein is denied.

Date: May 20, 2013

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).