

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

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

Student,¹ by and through the
Petitioner,

Date Issued: June 19, 2012

Hearing Officer: Michael Lazan

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") received by Respondent on April 5, 2012. This IHO was appointed to hear this matter shortly thereafter, on April 9, 2012. Respondent filed a Response to the Complaint on April 19, 2012. This Response was untimely pursuant to applicable regulation.² No resolution meeting was held. The resolution period expired on May 5, 2012. The HOD was due on June 19, 2012.

¹ Personal identification information is provided in Appendix A.

² If DCPS has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, DCPS must, within 10 days of receiving the due process complaint, send to the parent a response that includes, inter alia: (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options considered and the reasons why those were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of other factors relevant to the agency's proposed or refused action. 34 C.F.R. 300.508(e).

The Complaint was filed together with a motion on “stay-put” issues. On April 11, 2012, DCPS filed opposition papers to the stay-put motion. On April 18, 2012, oral argument was held in regard to the stay-put issues. A stay-put order was issued on April 23, 2012 in favor of Petitioners, keeping the Student at School A.

On May 14, 2012, this Hearing Officer was informed that Darnell Henderson, Esq. was representing Petitioners, replacing James E. Brown and Associates. Mr. Henderson filed a Notice of Appearance on May 21, 2012.

A Prehearing Conference was held on May 21, 2012. A Prehearing Conference Summary and Order was issued on May 24, 2012. In this Order, this IHO directed Petitioners to provide an affidavit to the effect that they consented to the change in counsel within 5 business days of issuance of the Prehearing Conference Summary and Order. (“the affidavit”) Additionally, disclosures were required to be sent to this Hearing Officer and opposing counsel by June 4, 2012 at 5pm.

The affidavit was not provided. On June 7, 2012, Respondent moved to dismiss the case because of the failure to provide the affidavit to this Hearing Officer. On June 9, 2012, Petitioners submitted opposition papers to the motion to dismiss. This motion was denied by written decision dated June 11, 2012.

Disclosures were submitted by Petitioners at 5:02pm on June 4, 2012. Disclosures were submitted by Respondents at 9:39pm on June 4, 2012.

Petitioners moved to strike Respondent’s disclosures by motion dated June 7, 2012. Respondent submitted opposition papers to this motion on June 9, 2012. This motion was withdrawn by oral statement of counsel during the hearing on June 11, 2012.

Respondents moved to strike Petitioners' disclosures by motion dated June 8, 2012. Petitioner filed opposition papers in connection to this motion on June 9, 2012. This motion was denied by oral order from this Hearing Officer at the hearing on June 11, 2012.

A hearing was held on June 11, 2012. This was a closed hearing. Petitioners were represented by Darnell Henderson, Esq. Respondent was represented by Maya Washington, Esq. Petitioner entered into evidence exhibits 1-9; Respondent entered into evidence exhibits 2, 3, 4, 6, 8. Petitioner presented as witnesses: Dr. Dennis Hilker, a psychologist; the parent; Yasmeeen Howell, Educational Advocate; School A; School A. Respondent presented as witnesses: DCPS. At the end of the hearing day, the parties agreed to submit written closing statements by Thursday, June 14, 2012. Such closing statements were submitted on June 14, 2012.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Student is male, years old, and eligible for services as a student with an emotional disturbance. He currently attends school at School A.

The Complaint raises the following issues relating to the IEP reflecting the IEP meeting date of January 18, 2012: 1) the proposed specific school location, School B, is set up to serve students with emotional disturbance/behavior problems, which is inappropriate for the Student;

2) School B seeks to re-integrate the students into a general education setting, which setting would be inappropriate for the Student; 3) School B does not have the vocational training component that the Student requires; 4) School B uses computer-based instruction which the Student would not be able to access because he does not have the necessary reading skills or hand dexterity; 5) School B employs special education teachers without content area certifications; 6) School B cannot provide differentiated instruction, a flexible schedule, or a high school diploma per the IEP; 7) School B cannot provide the Student with a location with minimal distractions, administer tests over several days, or provide extended time on subtests per the IEP; 8) School B cannot provide the appropriate number of hours of special education instruction per the IEP; 9) School B would provide the Student with inappropriate exposure to non-disabled peers; 10) School B would provide an 10 month program, whereas the Student requires an 11 month program; 11) School B would inappropriately place the Student in classes with other students who are on different academic levels; 12) School B would inappropriately group the Student with other students in regard to age; 13) School B would inappropriately keep the Student in a single classroom all day; 14) School B would employ an inappropriate behavior management system for the Student; 15) School B has too large a classroom size for the Student; 16) the size of the school setting at School B is too large for the Student.

The Complaint also alleges that the IEP is invalid because it fails to address the Student's needs in terms of occupational therapy and fails to provide the Student with an appropriate transition plan.

Additionally, the Complaint alleges that the IEP inappropriately recommends that the Student be transferred to a different specific school location mid-year.

As relief, Petitioner seeks: 1) placement of the Student at School A for the 2012-2013 school year; 2) that the IEP team reconvene and revise the IEP to add appropriate occupational therapy services; 3) that the IEP team reconvene and revise the IEP to add an appropriate transition plan.

ISSUES

The issues to be determined are as follows:

1. Did DCPS deny the Student a FAPE by its IEP reflecting the meeting dated January 18, 2012, which fails to provide the Student with occupational therapy services?
2. Did DCPS deny the Student a FAPE by its IEP reflecting the meeting dated January 18, 2012, which fails to provide the Student with an appropriate transition plan?
3. Did DCPS deny the Student a FAPE by recommending a change to the Student's specific school location to School B in the middle of the school year during the meeting dated January 18, 2012?
4. Did DCPS deny the Student a FAPE because DCPS cannot implement the IEP reflecting the meeting dated January 18, 2012? The parent contends that School B cannot implement the IEP in the following ways: a. School B is set up to serve students with emotional disturbance/behavior problems, which is inappropriate for the Student; b. School B will integrate the Student into a general education environment if there is behavioral progress; c. School B does not have the vocational training component that the Student requires; d. School B uses computer-based instruction which the Student would not be able to access because he does not have the necessary reading skills or hand dexterity; e. School B employs special education teachers without content area certifications; f. School B cannot provide differentiated instruction, a flexible schedule, or a high school diploma per the IEP; g. School B cannot provide

the Student with a location with minimal distractions, administer tests over several days, or provide extended time on subtests per the IEP; h. School B cannot provide the appropriate number of hours of special education instruction per the IEP; i. School B would provide the Student with inappropriate exposure to non-disabled peers; j. School B would provide a 10 month program, whereas the Student requires an 11 month program; k. School B would inappropriately place the Student in classes with other students who are on different academic levels; l. School B would inappropriately group the Student with other students in regard to age; m. School B would inappropriately keep the Student in a single classroom all day; n. School B has too large a classroom size for the Student; o. The size of the school setting at School B is too large for the Student.

FINDINGS OF FACT

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

1. The Student has been determined to be eligible for special education as a student with an emotional disturbance. (Stipulation, PHC Summary and Order)
2. During middle school, the Student transferred from School D to another school which provided him with educational benefit. (Exh. 5-2; Testimony of Parent)
3. During the beginning of the 2010-2011 school year, the Student attended School C. (Stipulation, PHC Summary and Order)
4. During the middle of the 2010-2011 school year, Petitioner and Respondent entered into a settlement agreement, placing the Student at School A for the 2010-2011 school year. (Stipulation, PHC Summary and Order)

5. The Student attended School A for the remainder of the 2010-2011 school year. (Stipulation, PHC Summary and Order)

6. In Spring, 2011, an IEP team determined that the Student was to receive 26.5 hours a weekly of specialized instruction outside the general education setting and behavioral support services of one hour per week outside the general education setting. At such meeting, the IEP team provided that the specific school setting for the Student's educational services was School A. There was agreement between the parties on all issues. (Stipulation, PHC Summary and Order)

7. The Student has attended School A for the 2011-2012 school year. (Stipulation, PHC Summary and Order)

8. The Student has an absentee problem at school and often comes to school late. (Exh. R-4-2)

9. The Student has been diagnosed with Oppositional Defiant Disorder, Depressive Disorder NOS, Cannabis Abuse, Organic Mood Syndrome . (Exh. 5-3-4)

10. At School A. the Student has had some behavior problems but has responded to firm intervention. He can be drawn into participation with other Students who are not compliant with rules. He has not been suspended at School A. (Exh. 5-2, 5; Testimony of

11. The Student is engaging in counseling at the school and has improved in his responsiveness to counseling. (Testimony of

12. As indicated on the report of Alan Nathan, Ph.D. dated June 22, 2011, the Student exhibited borderline to average scores on the WISC-IV and borderline to low average scores on the Woodcock-Johnson III, with math skills that were "far below average." (Exh. 5-4)

13. As indicated on the report of Alan Nathan dated June 22, 2011, the Student indicated a “clinically significant” delinquent predisposition on the MACI and BASC-2, indicating also social insensitivity, unruly behavior, family discord, oppositional behavior, doleful behavior. (Exh. 5-4)

14. An observation by Jennifer Switlick dated November 10, 2011 indicated that the Student worked independently on a project with minimal assistance from the teacher. He stayed on task and asked questions in an appropriate manner. (Exh. R 8-1-2)

15. As indicated in the report of Dennis Hilker dated November 23, 2011, the Student scored 85 on the WASI, falling in the low average range. (Exh. 5-5)

16. As indicated in the report of Dennis Hilker dated November 23, 2011, the Student scored 85 on the Woodcock-Johnson III, falling in the low average range. The Student’s broad reading scores were 94, in the average range. The Student’s broad math scores were 80, in the low average range. The Student’s broad written language scores were 86, in the low average range. These scores were compiled by Sharon Lennon. (Exh. 5-7; Testimony of Hilker)

17. As indicated in the report of Dennis Hilker dated November 23, 2011, on the BASC-2 the Student scored in the clinically significant range for hyperactivity, aggression, conduct problems, depression, atypicality, attention problems when reported by the male teacher. (Exh. 5-11)

18. As indicated in the report of Dennis Hilker dated November 23, 2011, on the MMPI-Adolescent Version the Student answered questions in a pattern that indicated an elevation in “psychopathic deviate” feelings of anger, with a significant elevation in feelings of paranoia. He can be “intensely aroused” and angry in the school environment, and requires

individuals who can calm him down. He is afraid of being seen as unintelligent and unwanted.

(Exh. 5-11; Testimony of Hilker)

19. In Dr. Hilker's report, the Student is diagnosed with Oppositional Defiant Disorder, Paranoid Personality Disorder. (Exh. 5-12)

20. Dr. Hilker did not notice any physical issues with the Student's hand when he met the Student during the assessment. (Testimony of Hilker)

21. An IEP team met to review the Student's educational progress on January 18, 2012. (Exh. 2)

22. At the IEP review on January 18, 2012, Dr. Wesley Campbell of DCPS reviewed the Student's evaluations and determined that the Student needs academic remediation but that his primary issues are emotional. (Exh. 3-1)

23. At the IEP review of January 18, 2012, the parent indicated that the Student had behaved well in his current setting and expressed a desire to keep the Student in the setting (Exh. 3-1)

24. At the IEP review of January 18, 2012, the parent raised an issue relating to the Student's injury to his thumb. This injury was as a result of a gunshot wound. (Exh. 3-1)

25. At the IEP review of January 18, 2012, Educational Advocate Yasmeeen Howell requested an occupational therapy evaluation for the Student. (Testimony of Howell)

26. In response to the inquiry about occupational therapy, DCPS, through Benjamin Persett, asked for documentation to evidence that issue. . . . indicated that an analysis of existing data must be done and that another meeting to discuss data could be scheduled.

asked for work samples and medical documentation. (Exh. 3-5; Testimony of l

27. DCPS had not been informed about the issues with the Student's hand previously.
(Testimony of Persett)

28. At the IEP review of January 18, 2012, it was reported by _____ the Student's teacher, that the Student had been doing well in math but had missed time due to an injury.

_____ also indicated that the Student has shown improvement in coping skills but still shows the propensity to have anger issues and anxiety. He "gets excited" and a little "hyper" but this can be controlled by prompts and redirection. (Exh. 3-2)

29. At the IEP review of January 18, 2012, it was reported by Ms. Torney that the Student is taking more responsibility for his actions and is participating in counseling. (Exh. 3-2)

30. At the IEP review of January 18, 2012, it was reported that the Student has shown an interest in the automotive field and enjoys working on cars. He wants to learn more about running and owning a business. He also wants to go to college for law. (Exh. 3-3)

31. The IEP team based this review on a psychological assessment, existing behavioral and academic data, teacher reports, therapist reports, attendance data. (Exh. 1-1)

32. _____ from School A had created a transition services plan for the Student's IEP. (Exh. 3; Testimony of Howell)

33. At the IEP review of January 18, 2012, the IEP recommended a placement at School E but the parent indicated that the Student had a "stay-away" order from that vicinity. The parent objected to the change in school, indicating that the Student had only one year of school left and had shown progression. The parent objecting to the Student having to learn a new routine. The parent objected to there being no vocational automotive program at School E. (Exh. 3-3-4)

35. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student needs to develop his math fluency and has difficulty working on math problems that require speed. (Exh. 2-2)

36. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student needs to develop his reading fluency and has difficulty working on reading problems that require speed. (Exh. 2-2)

37. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student needs to write more complex sentences and that his deficits impact on his ability to perform grade level work. (Exh. 2-3)

38. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student needs to improve his attendance and, when in school, needs to remain in class. (Exh. 2-4)

39. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student needs to improve in terms of decision making, conflict resolution, coping skills. When upset, the Student is difficult to redirect and is impulsive. (Exh. 2-4)

40. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student has difficulty with school and classroom rules. (Exh. 2-4)

41. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student's strength is in communicating and participating in group activities. (Exh. 2-4)

42. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student shall receive 26.5 hours of services in a setting outside general education, with a start date of January 18, 2012 with an end date of January 17, 2013. (Exh. 2-5)

43. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student shall receive behavioral support services of one hour per week with a start date of January 18, 2012 with an end date of January 17, 2012. (Exh. 2-5)

44. The IEP reflecting the meeting date of January 18, 2012 indicates that the Student shall receive classroom accommodations of repetition of directions, simplification of oral directions, reading of test questions (math, science, composition), use of calculators, preferential seating, location with minimal distractions, testing administered over several days, breaks between subtests, extended time on subtests, tests administered at best time of day. (Exh. 2-8)

45. The Post-Secondary Transition Plan on the IEP reflecting the meeting date of January 18, 2012 indicates that the Student has employment interest in business ownership, automotive technology, and law. (Exh. 2-9)

46. The Post-Secondary Transition Plan on the IEP reflecting the meeting date of January 18, 2012 indicates that the Student has been interviewed through the Vocational Interest Inventory Interview. The Student indicates an interest in attending community college or a four year college to study business or law. (Exh. 2-10)

47. A Long Range Goal for the Student on the Post-Secondary Transition Plan on the IEP reflecting the meeting date of January 18, 2012 is for attendance at a community college or four year college. Related Short-Term Measurable Goals on the Post-Secondary Transition Plan on the IEP reflecting the meeting date of January 18, 2012 indicate that the Student will create and conduct a 15 question interview for professionals in his fields of interest, including lawyer and business owner. (Exh. 2-11)

48. The Post-Secondary Transition Plan on the IEP reflecting the meeting date of January 18, 2012 indicates that the Student shall receive transition support for one hour per week, with a begin date of January 18, 2012 and end date of January 17, 2013. (Exh. 2-11)

49. A "Coordinated Set of Activities for Employment" section of the Post-Secondary Transition Plan on the IEP reflecting the meeting date of January 18, 2012 indicates that the Student's long range goal is to be employed in the field of automotive technology as a business owner. Related Short-Term Measurable Goals indicate identifying, articulating, and demonstrating proper workplace etiquette, identifying basis vocabulary on a post-secondary application and successfully completing the name, address, phone number, social security number, references with little to no assistance, being able to effectively count money and determining correct change for bills totaling to (Exh. 2-12)

50. The Post-Secondary Transition Plan on the IEP reflecting the meeting date of January 18, 2012 indicates that the Student will receive a referral to adult services for one hour during the school year. (Exh. 2-12)

51. The Extracurricular Activities and Community Participation section of the IEP reflecting the meeting date of January 18, 2012 indicates that the Student will conduct site visits to law offices and small businesses, may seek part time employment after school, and increase access to community resources. (Exh. 2-12)

52. A Prior Written Notice was issued on January 19, 2012 proposing to change the Student's school setting to School B. (Exh. 1-1, Exh. R 3-1)

53. School B classrooms conduct academic, behavioral and vocational assessments and then develop an individual course of student to address academic deficits, graduation, work experience preferences, behavioral programming. (Exh. 8-1)

54. School B classrooms give each Student access to a personal workstation with a computer and learning materials. (Exh. 8-1)

55. School B classrooms are for Students who have or are at risk for emotional disturbance. (Exh. 8-2)

56. The parent visited School B. She did not schedule a visit at the school. She met with a _____ who gave the Student a breakdown of the services to be provided at School B. (Testimony of parent)

57. The parent asked _____ about the possibility of a 1-1 aide at School B. She was told that no such aide was available. She was told that computer work is an important element of the curriculum at School B. (Testimony of parent)

58. The parent spoke to other students who were enrolled in the program at School B. Some of the students liked the program, others did not. (Testimony of parent)

59. At School B, teachers are certified special education teachers who are not certified in the content areas. (Testimony of Howell)

60. At School B, coursework is completed on computers through the A+ system, which can provide students with Carnegie credits. (Testimony of Howell)

61. School B will reopen as the R program beginning on August 27, 2012. (Exh. R 2-1; Testimony of Persett)

62. The R program will offer a “rigorous” academic program, using online curriculum delivered by staff. Students can receive Carnegie units if they are on diploma track. (Exh. R 2-1)

63. School A is a vocational high school with students who are learning disabled, emotionally disturbed. The school has vocational classes in automotive work, cosmetology, barbering. (Testimony of Davis)

64. Students at School A range from ages 15-21. There are very small class sizes at School A. The school offers an 11 month program. Classes are offered in Math, English, Science, Social Studies in 45 minute blocks. (Testimony of Davis)

65. The automotive classes at School A are taught by a mechanic and his assistant. (Testimony of Davis)

66. Certain teachers at School A have allowed their teaching certifications to lapse. (Testimony of Torney; Testimony of Persett)

67. School A has not been responsive to requests by DCPS to provide information about basic IEP requirements, including in regard to goals and objectives, curriculum requirements, grades, progress reports, truancy, certifications. (Testimony of Persett)

68. School A has not been diligent about paying attention to the timely arrival of students, and does not provide challenging curriculum to students. (Testimony of Persett)

69. This Hearing Officer found all of the witnesses credible in this matter except Ms. Torney, who is found to be partly credible as a result of answers that were incomplete during cross-examination.

CONCLUSIONS OF LAW

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

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005); see Hinson v. Merritt Educ. Center, 51 IDELR 65 (D.D.C. 2008)(inadequate number of witnesses called by Petitioner at hearing).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). 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." Rowley, 458 U.S. at 201. The IDEA, according to Rowley, 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; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

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 child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

1. Failure to Provide Occupational Therapy.

Petitioner contends that the District denied the Student a FAPE in connection to the IEP dated January 18, 2012 because no occupational therapy was recommended in connection to that IEP.

In the United States Supreme Court decision in Rowley, the Court held that the IEP must be judged by whether it was reasonably calculated to provide educational benefit. 458 U.S. at 206-207. Following Rowley, in S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP must be determined as of the time it was offered to the student. Citing to Circuit court decisions, the Court found that an IEP should be judged prospectively to avoid "monday morning quarterbacking." See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

Petitioners allege that the student has an injured hand which requires him to receive occupational therapy. However, there is nothing in the record to suggest that DCPS had any realistic way of knowing about this injury prior to the IEP review of January 18, 2012. There is nothing to suggest that the parent provided DCPS with any notice of this injury prior to the IEP

meeting. Cf. Richardson v. District of Columbia, 541 F.Supp.2d 346 (D.D.C. 2008)(where parent did not make assessments available, DCPS not liable for failure to evaluate). Moreover, I credit the testimony of Benjamin Persett of DCPS that School A has been unresponsive to DCPS requests for information about students' progress. Without access to such information, DCPS could not have known about the Student's hand injury.

DCPS's reaction to the notice of this injury was to request work samples and medical documentation to determine the impact of the injury on the Student's educational performance. DCPS indicated that it would reconvene the IEP team upon review of such documentation to determine the need for occupational therapy services. However, no such documentation was submitted to DCPS after the meeting. Moreover, though Petitioners bear the burden of persuasion, no such documentation has been submitted to this Hearing Officer. Though the Student's medical doctor was referenced as a witness in the prehearing conference order, no medical witness was called to testify by Petitioners to provide details about the Student's hand injury. An occupational therapist was also not called as a witness by Petitioners to explain how occupational therapy could provide educational benefit to the Student.

Additionally, witnesses from School A indicated that the Student functioned in school during the 2011-2012 school year with the hand injury. Work at School A included some written work which the Student was able to complete without occupational therapy. Work at School A also involved automotive repair work which would require use of the hands. The Student was able to complete this work without receiving occupational therapy at school.

Under the circumstances, I find that DCPS did not deny the Student a FAPE by failing to include occupational therapy in the January 18, 2012 IEP.

2. Failure to Provide an Appropriate Transition Plan.

Transition Services are defined as “a coordinated set of activities for a child with a disability” that is a “results oriented process” that is “based on the individual child’s needs.” 34 CFR Sect. 300.43. The focus of transition services is to “improve the academic and functional achievement of a child with a disability, to facilitate the child’s movement from school to post-school activities.” Id. Services must be “based on an individual child’s needs, taking into account the child’s strengths, preferences and interests” and includes instruction, related services, community experiences, employment and other post-school adult living objectives, and “if appropriate” acquisition of daily living skills and provision of a functional vocational evaluation. Id.; see also 71 Fed. Reg. 46579 (2006)(definition of transition services is written broadly).

Beginning when the Student is 16, or younger if determined to be appropriate by the IEP team, the IEP must include appropriate measurable post-secondary goals based upon appropriate transition assessments relating to training, education, employment, and where appropriate independent living skills. 34 CFR Sect. 300.320(b); see 20 U.S.C. Sect. 1414(d)(1)(A)(i)(VII).

A review of the IEP indicates that the Transition Plan is based on a Vocational Interest Inventory Review, which determined that the Student is interested in attending a community college or a four year college or university to study business or law and is interested in being a business owner in the field of automotive maintenance and technology.

Long range goals focus on the Student attending such a college or university, being employed in the field of automotive technology as a business owner, and living independently following high school. All three of these goals are supported by short-term measurable goals. In regard to the long range goal of college or university attendance, the short-term goals relate to the Student researching entrance requirements, submitting applications, and creating and conducting a 15 question interview for professionals in the fields of law and business. In regard

to the long range goal of being employed in the field of automotive technology as a business owner, short-term goals relate to identifying, articulating and demonstrating proper workplace etiquette, "reporting the steps" necessary to become a small business owner, and being able to effectively count money and determine correct change for bills. In regard to the long range goal of living independently after high school, the short-term measurable goals include using transportation independently, successfully budgeting money, and obtaining his driver's license.

Extracurricular Activities are listed on the Transition Plan. The plan accordingly indicates that the Student will research colleges and universities, conduct college site visits, conduct site visits to law offices and small businesses, part seek part-time employment after school, increasing access to community resources, completing drivers' education classes.

The plan also includes direct services. The plan calls for Transition Support for Post-Secondary Goals one hour per week, and Transition Support for Employment for one hour during the year.

Petitioners' argument is that the plan is not appropriately focused on the Student's interests and is generic. However, the plan is in fact individualized, since it focuses in part on the Student's interests as reported on the vocational assessment. In particular, the plan calls for specific results: the Student working as an owner of a business in the automotive field. It also includes a community component, an employment component, a living skills component. The plan has a variety of long range goals that are well supported by detailed short-term goals. Moreover, Petitioner presents no testimony or evidence that the goals are unrealistic for the Student, would be unhelpful to the Student, or would not be measurable. Indeed, Petitioners do not so argue.

Finally, it is important to point out that the test to determine a FAPE allegation in this context is to determine whether the plan would provide the Student with a meaningful educational benefit. See Virginia S. v. Department of Educ., 47 IDELR 42 (D. Haw. 2007)(District created transition plan that would apply to virtually every student; no FAPE violation because plan would have benefited student). This plan meets all the legal requirements in the statute and regulations and would provide the Student with a meaningful benefit. Petitioners' claim of a FAPE violation in this connection are denied.

3. Change of Specific School Location: Mid-year.

Petitioners allege that the Student was denied a FAPE because of DCPS's offer to change the Student's specific school location in the middle of the school year.

Courts hold that school districts may designate schools for students as long as such schools may implement a Student's IEP. T.Y. v. New York City Department of Educ., 584 F.3d 412 (2d Cir. 2009). Although the LEA has the discretion with respect to the location of services, that discretion cannot be exercised in such a manner to deprive a Student of a FAPE. Holmes v. District of Columbia, 680 F. Supp. 40 (D. D.C. 1988).

In Block v. District of Columbia, 748 F Supp. 891 (D.D.C. 1990) the Court acknowledged that while the District's proposed school might be appropriate for a learning disabled student, there was substantial evidence to support a finding that a "mid-year change of placement" would pose a serious educational risk to the student. The Court noted, inter alia, that the student had made progress in the current school, had difficulties with transitions, and that it would be inappropriate for the student to move schools given the student's emotional state. See also Holmes, 680 F. Supp. 40 (D.D.C. 1988)(noting that the proposed District school was in a start-up posture and indicating that "to send the plaintiff to a new school to complete the last semester of

schooling would be “insensitive”); Burger v. Murray County School Dist., 612 F. Supp. 434 (N.D. Ga. 1984)(“obvious advantages inhere to any child who is permitted to learn in a stable environment. This advantage may have even more meaning to the handicapped child”).

Petitioners contend that the record shows that the Student has had significant difficulties transitioning from school to school and that the Student would suffer a significant setback if he were to be transferred from School A, where he has made “tremendous” progress. However, the record does not detail the Student’s previous transitions between schools. In fact, the record suggests that the transition between schools can go smoothly for the Student. In this connection, the parent testified that the Student successfully transferred from School D to another school where instruction was appropriate for the Student.

Additionally, the record does not support the proposition that the Student has made academic progress at School A. The record shows that the student has been absent or tardy from School A numerous times and that the school has a curriculum that is not sufficiently challenging. There were no progress reports presented for the Student and no report cards presented for the Student. Additionally, none of the Student’s teachers were called as a witness. The record also suggests that school officials have not been implementing IEPs for students, have not provided certified teachers to students, and have been unresponsive to reasonable requests for information by DPCS. Though there is testimony in the record to the effect that the Student has made some progress emotionally, the record indicates that the Student continues to have behavioral difficulty in school.

It should be noted that Petitioners do not specifically suggest that the mid-year transfer would have had an impact on the Student’s automotive study. The record does not indicate that the automotive work at School A would result in any particular “certification” after the school year ended. The record also does not indicate that the automotive work at School A was structured in

such a manner that the Student needed to complete the entire school year to gain educational benefit from it.

Finally, it should be noted that this issue is currently a moot one, since the stay-put order in this case kept the Student at School A during the entirety of the 2011-2012 school year.

Under these facts, I find that the District did not violate the Student's right to a FAPE by proposing a mid-year transfer during the January 18, 2012 IEP meeting.

4. Claims Relating to School B and the R Program.

Petitioners' remaining claims relate to the appropriateness of the educational services to be provided by School B, shortly to be "renamed" the R program. At the prehearing conference, the parties agreed to characterize the remaining claims relating to the specific school location as "failure to implement" claims. However, Petitioners' closing statement characterizes these as "change of placement" claims.

A school district may be found to have denied a FAPE if it is shown that the district cannot materially implement the IEP. Savoy v. District of Columbia, ___ F.Supp.2d ___, 2012 WL 548173 (D.D.C. February 21, 2012). To prevail on a "failure to implement" claim, Petitioners challenging the implementation of the IEP must show more than a de minimis failure to implement all elements of the IEP. Instead, Petitioners must show that "substantial or significant" portions of the IEP could not be implemented. Savoy, 2012 WL 548173 @ *6 (citing Houston Ind. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir 2000); Van Duyn v. Baker Sch. Dist. 5J, 502 F.2d 811, 822 (9th Cir. 2007)).

An "educational placement" must be based on an IEP. 34 CFR Sect. 300.116(b)(2). In Letter to Fisher, the United States Department of Education Office of Special Education Programs (OSEP) called the issue of determining change of educational placement a "very fact-specific inquiry." Letter to Fisher, 21 IDELR 992 (OSEP 1994). OSEP concluded that whether

a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter the child's educational program" and set forth the following factors to be considered in determining whether a change in educational placement has occurred:

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.

Letter to Fisher, 21 IDELR 992; see also Veazey v. Ascension Parish Sch. Board, 121 Fed. Appx. 552 (5th Cir. 2005). As stated by the D.C. Circuit in Lunceford v. District of Columbia, 745 F.2d 1577 (D.C. Cir. 1984): "there must be a fundamental change in, or elimination of, a basic element of the educational program in order to qualify as a change in educational placement."

In regard to Petitioners' claim that School B and the R Program are inappropriate because they are set up for children with emotional disturbance, the Student is classified with an emotional disturbance himself. According to testing conducted by Dr. Hilker, the Student can be "intensely aroused" and angry in the school environment, answers questions with a pattern than indicated an elevation of "psychopathic deviate" feelings of anger, and requires individuals who calm him down. Dr. Hilker diagnosed the Student with Oppositional Defiant Disorder and Paranoid Personality Disorder and indicated that the Student responds to behavioral interventions. Moreover, the record shows that the Student was educated with other students with emotional disturbance at School A. Further, there is no showing that behavioral programs at School B and the R Program are violative of the IEP. The record does not support the

contention a change to School B and the R Program would result in a material failure to implement the IEP, would harm affect the Student, or would fundamentally change the placement.

Similarly, Petitioners' claims relating to the "level" system at School B and the R Program are similarly without merit. While the record indicates that the proposed program at School B and the R Program have a behavioral component with various "levels" that might ultimately culminate in a particular student progressing to general education after going through each and every level, the record does not indicate that this particular Student would be placed in general education as a result of the "level" system during the time period fixed by the IEP.

In regard to the claim that the school setting at School B and the R Program is too large, there is nothing in the record to suggest that the larger school setting at School B or the R Program would have any impact on the Student. Further, the IEP does not require a particular size of school for the Student. While School B and the R Program are larger than School A, I find that this difference between School A and School B and the R Program would not fundamentally alter the Student's placement.

In regard to the claim pertaining to class size, the record indicates that the Student does require small class size. However, the record suggests that School B and the R Program also provides small classes. There is nothing in the record to indicate that any difference in class size between School A and School B or the R Program would result in an inability to implement the IEP, would materially affect the Student, or would fundamentally change the placement. It should be noted that the IEP does not mandate a particular class size.

Petitioners' contention that School A differentiates instruction while School B and the R Program do not is not supported at all by the record. There is nothing at all in the record to suggest that School B and the R Program do not differentiate instruction. Petitioners also contend that School A's flexible schedule and the "class to class" nature of the school day at School A are material to this Student's academic success. While the record suggests that School B and the R Program do not have such features, the IEP does not require such elements. Moreover, there is nothing in the record to suggest that such features are material to the Student's educational program or would result in a fundamental change of placement.

Petitioners' claim that School B and the R Program would have provided the Student with general education classes is not supported at all by the record. Petitioners' claims that School B and the R Program would have integrated the Student with general education students are also not supported by the record.

Petitioners' claim that School A provides an 11 month program while School B and the R Program offer a 10 month program is similarly without merit. There is nothing in the record to suggest that such a change would result in a material failure to implement the IEP, would have significant impact on the Student, or would result in a fundamental change to the placement.

Petitioners also contend that the special education teachers at School B do not have content area certifications. However, Petitioners do not contest that the School B program has been approved by OSSE. Moreover, the record does not establish that the lack of content area certifications would result in a failure to implement the IEP, have any material impact on the Student at School B or the R Program, or result in a fundamental change of placement.

Petitioners also contend that School B and the R Program do not have the vocational training component that the Student requires. The record indicates that the Student would not

receive an automotive repair class at School B or the R Program. However, the IEP does not require a hands-on vocational training program or an automotive repair class for the Student. Further, there is nothing in the record to establish that the Student “requires” a hands-on vocational component to benefit from an education. The parent did not so state, and the Student did not testify in this matter to support this claim. While Dr. Hilker did indicate that the Student could be motivated by vocational work, the record suggests that School B and the R Program would work on the Student’s vocational skills consistent with the Transition Plan. Moreover, Dr. Hilker’s BASC testing and MMPI testing does not support the contention that the Student “requires” hands-on vocational training to function in school. On this record, this Hearing Officer cannot find that the Student required a “hands on” vocational training component to benefit from the educational program at School B and the R Program. Accordingly, Petitioners have not shown that the lack of “hands on” vocational training at School B and the R Program creates a fundamental change to the Student’s educational program. N.D. v. State of Hawaii Dep’t of Educ., 600 F.3d 1104, 116-117 (9th Cir. 2010)(elimination of one entire school day for 17 weeks during the school year did not constitute change of placement); Cavanagh v. Grasmick, 75 F. Supp.2d 446, 463 (D. Md. 1999)(Student transferred out of one of his classrooms during school year; court found no change in placement).

Petitioners also contend that School B and the R Program employ computer-based instruction which the Student would not be able to access because he does not have the necessary reading skills or hand dexterity. The record indicates that Dr. Hilker tested the Student’s reading and found that the Student’s Broad Reading scores on the Woodcock-Johnson III with 94, in the low average range. Dr. Hilker found that the Student’s Basic Reading Skills score was 87 on the Woodcock-Johnson III, also low average range. There is nothing in the record to

establish that such reading skills are incompatible with the A+ computer-based curriculum at School B and the R Program. In regard to hand dexterity, the record does indicate that the Student has had some problems with his thumb, which was injured by a gunshot. However, there is nothing in the IEP to prevent the Student from receiving instruction on a computer. Moreover, the record indicates that the Student has been performing automotive repair work and writing work at School A. While the Student does feel discomfort when he writes for a “very long period” of time according to there is nothing in the record to establish that the Student would have to be on the computer for “very long periods of time” at School B or the R Program. There is no medical documentation in the record to establish that the Student is unable to access a computer curriculum given the condition of his hand. There is no occupational therapy report in the record to establish that the Student is unable to use a computer given the condition of his hand. There was no testimony from an occupational therapist or a medical doctor to establish that the Student is unable to access the computer curriculum given the condition of his hand. Finally, there were no work samples submitted to this Hearing Officer to establish that the Student could not access a computer program. Under the circumstances, I find that Petitioners have not met their burden to establish that the change to a computer-based curriculum would be result in a failure to implement the IEP, would be inappropriate for the Student, or would result in a material change of placement.

Finally, Petitioners’ Complaint also alleges that School B cannot provide the Student with a location with minimal distractions, administer tests over several days, provide extended time on subtests, would inappropriately group the Student with other students in regard to age, and would not provide the IEP mandated amount of specialized instructional hours. None of

these contentions are supported in the record or are clearly explained in Petitioners' closing statement. Each of these claims is denied.

In sum, the Student's disability is emotional in nature. The record indicates that the Student requires a small, self-contained classroom led by a special education teacher with behavioral supports to address these needs. These services are provided by School B and the R Program, consistent with the IEP. Petitioner has not shown that differences between School A and School B and the R program are fundamental to the Student's special education needs. As a result of the foregoing, I find that the District did not deny the Student a FAPE when it recommended the school setting of School B in its Prior Written Notice dated January 19, 2012.

5. Unilateral Placement at School A.

Assuming arguendo that the District did deny the Student a FAPE through its IEP dated January 18, 2012, this Hearing Officer will consider whether School A is an appropriate setting for the Student for the 2012-2013 school year.

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief "must be tailored" to meet a student's "unique needs." Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors" 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.

A recent case in the District of Columbia underscores the point that an IHO need not grant relief for a non-public school if a public school is available. In N.T. v. District of Columbia, 2012 WL 75629 (D.D.C. 2012), where there was a finding of FAPE denial, the Court found that a non-public placement was not justified because, inter alia, the parents “have not argued, let alone demonstrated,” that a public school could not meet the student’s educational needs. Id. At *4.

Applying the standards articulated in Branham, I find that School A would not be appropriate for the Student for the 2012-2013 school year. In particular, the record does not indicate that the student has progressed academically at the school. No progress reports have been submitted from the school, no report cards have been submitted from the school, no detail was provided by the witnesses about the academic work at the school or the Student’s progress in such work. No teachers were called as witnesses at the hearing. Moreover, the record indicates that the Student continues to have a problem with absence and tardiness. Further, Petitioners did not rebut claims by _____ of DCPS that the school has a curriculum that is not sufficiently challenging for students. _____ also indicated that School A staff has not been implementing IEPs for students, have not provided certified teachers to students, has not been implementing goals for students, has not completed progress reports, and has been unresponsive to reasonable requests for information by DPCS. None of these claims were convincingly rebutted by Petitioners’ witnesses. Though there is testimony in the record to the effect that the Student has made some progress at School A emotionally, the record indicates that the Student continues to have behavioral difficulty in school. Petitioners contend that the Student has only one more year left of school and

should be allowed to finish out his education at School A. However, Petitioners do not provide any legal support for this contention.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Due Process Complaint in this matter is dismissed with prejudice.

Dated: June 19, 2012

Michael Lazan
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 USC §1415(i).

Date: June 19, 2012

Michael Lazan
Impartial Hearing Officer