

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
April 1, 2014

STUDENT, ¹)	
through the Parent,)	
)	
Petitioner,)	
)	Hearing Officer: Virginia Dietrich
v.)	
)	
Friendship Public Charter Schools)	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of Student, filed a due process complaint notice on January 17, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) by Friendship Public Charter Schools (“FPCS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that for the last 12 school days of the 2012/13 school year (“SY”) and from the beginning of the 2013/14 SY until late October 2013, FPCS failed to implement Student’s Individualized Education Program (“IEP”) in numerous ways.

Petitioner alleged in the alternative, that for the last 12 school days at the end of the 2012/13 SY and from the beginning of the 2013/14 SY until mid January 2014, FPCS failed to provide Student with an appropriate IEP in that the IEP did not specify a full-time vocational program as Student’s educational placement; that the specific site or school location of services was not specified on the IEP; and that the number of service hours required to attend two different school programs during these time periods was not accurately reflected on Student’s IEP.

FPCS argued that at all times it was timely responsive to Student’s educational needs; that it fully implemented Student’s IEP; that Student’s IEP was not inappropriate because it failed to identify a full-time vocational program, a specific school site location or a particular

¹ Personal identification information is provided in Appendix A.

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number of hours to participate in two different school programs; and that at all times, Student had an appropriate educational placement.

Subject Matter Jurisdiction

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

Procedural History

The due process complaint was filed on 01/17/14. This Hearing Officer was assigned to the case on 01/24/14. FPCS timely filed an answer to the complaint on 01/27/14 and made no challenges to jurisdiction.

Petitioner waived the resolution meeting, but FPCS did not. A resolution meeting took place on 01/28/14 at which time parties resolved Issue #1 of the complaint. By email dated 01/29/14, parties clarified that they agreed to have the resolution period end on 02/16/14, which was the last day of the resolution period. The 30-day resolution period ended on 02/16/14, the 45-day timeline to issue a final decision began on 02/17/14 and the final decision was due by 04/02/14.

A prehearing conference took place on 02/07/14 and 02/11/14. A Prehearing Order was issued on 02/15/14. By email dated 02/19/14, Petitioner requested changes to the Prehearing Order. By email dated 02/17/14, FPCS requested changes to the Prehearing Order. The requested changes were addressed at the due process hearing.

FPCS filed a Motion To Implead School B on 02/26/14. Petitioner filed an opposition to FPCS’ motion on 02/10/14. School B filed an opposition to FPCS’ motion on 02/10/14. FPCS’ motion was denied in the Order on FPCS’ Motion To Implead School B that was issued on 02/24/14.

On 02/21/14, Petitioner filed a Motion To Recuse Counsel For Friendship Public Charter School. FPCS’ opposed the motion in Defendant’s Response to Petitioner’s Motion To Recuse Counsel For Friendship Public Charter School that was filed on 02/24/14. An Order on Petitioner’s Motion To Recuse Counsel For Friendship Public Charter School was issued on 03/03/14, that denied Petitioner’s motion.

The due process hearing was a closed hearing that took place on 03/07/14 and 03/10/14. Petitioner was represented by Nicholas Ostrem, Esq. FPCS was represented by Ellen Dalton, Esq. Neither party objected to the testimony of witnesses by telephone as long as both party’s disclosures were available to the testifying witness. Petitioner participated in the hearing in person until her testimony and that of Student were concluded; thereafter, Petitioner was excused due to employment commitments.

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On 03/04/14, FPCS filed Respondent's Objections to Petitioner's Exhibits. On 03/05/14, Petitioner filed Petitioner's Objections to Respondent's Disclosures. Both party's objections were addressed at the due process hearing.

Petitioner's Disclosure Statement, dated 02/28/14, consisted of a witness list of nine (9) witnesses and documents P-1 through P-33. Respondent's objections to witnesses #5, #6, #7, #8, and #9 were held in abeyance until the witness testified. FPCS did not object to the testimony of witness #6 at the time that witness testified. P-1, P-2, P-5, P-7, P-9, P-10, P-16, P-19, and P-20-24 were admitted into evidence over objection. Respondent's objections to P-8, P-11, P-12, and P-13 were sustained; those documents were not admitted into evidence. The remainder of Petitioner's documents were admitted into evidence without objection.

FPCS' Five-Day Disclosure, dated 02/28/14, consisted of a witness list of thirteen (13) witnesses and documents R-1 through R-43. Petitioner's objections to the testimony of witnesses #1, #2, #4, #5, #8, and #12 were held in abeyance until the witness testified. Petitioner did not voice an objection to the testimony to any of FPCS' witnesses at the time of their testimony. R-5, R-7, R-8-1 to R-8-3, R-8-5 to R-8-11, R-8-13 to R-8-14, R-9, R-10, R-11, R-14, R-17, R-18, R-20, R-21, R-22, R-23, R-25, R-28, R-29, R-31, R-32, R-33, R-34, R-35, R-40, R-42, and R-43 were admitted into evidence over objection. The remainder of FPCS' documents were admitted into evidence without objection.

Petitioner presented the following four (4) witnesses in her case in chief: (1) Student; (2) Petitioner; (3) Director of Academics at School C ("School C Director"); and (4) Special education expert ("special education expert"). Petitioner presented no rebuttal evidence.

Midway through Petitioner's testimony, Petitioner indicated that she knew the Hearing Officer from a Family Court case in the District of Columbia many years ago. The Hearing Officer did not recognize Petitioner. No Hearing Officer recusal request was made.

FPCS presented the following seven (7) witnesses: (1) Office of the State Superintendent of Education ("OSSE") change in placement coordinator ("OSSE placement coordinator"); (2) Nonpublic placement monitor for School A ("FPCS nonpublic placement monitor"); (3) Academy Director at School B (School B Director); (4) Special education teacher at School B ("School B teacher"); (5) Psychologist/clinical supervisor/special education coordinator at School B ("School B SEC"); (6) Former Principal at School B ("School B Principal"); and (7) Director of special education compliance for School A who qualified as an expert in special education with respect to the development of IEPs, placement of children with special needs, and IEP compliance requirements ("FPCS special education compliance director").

At the conclusion of Petitioner's case in chief, FPCS moved for a directed finding in favor of FPCS. FPCS' motion was denied on the record.

Parties stipulated that there were twelve school days between 06/06/13 and the end of the 2012/13 school year.

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The two issues to be determined in this Hearing Officer Determination are as follows:²

Issue #1 – Whether FPCS denied Student a FAPE by failing to implement Student’s Individualized Education Program (“IEP”) while Student attended School B:

(1) From 06/06/13 until the end of the school year and from the beginning of the 2013/14 school year until 10/26/13; in that,

(a) Student did not receive some or any specialized instruction per his 02/28/13 IEP that required all specialized instruction services outside of general education, in that specialized instruction was not provided by a special education teacher; and

(b) Student did not receive 1 hour/week of behavioral support services per his IEP, in that (i) the counseling provided did not meet his behavioral needs, and (ii) services may not have been provided in the quantity prescribed by the IEP; and

(c) The use of a computer program blended model for instruction was inappropriate because Student did not receive any educational benefit from it; and

(d) No transition program services were made available to Student; and

(e) Student’s Behavioral Intervention Plan was not implemented; and

(f) FPCS failed to provide specialized instruction to Student during the times he was put out of the classroom due to his behavior; and

(2) From 10/01/13 through 10/26/13, in that the program at School B was unavailable to Student due to funding being rescinded.

Issue #2 – Whether FPCS denied Student a FAPE by failing to provide Student with an appropriate IEP; specifically, (a) from 06/06/13 through the end of the 2012/13 SY and from the beginning of the 2013/14 school year until 01/17/14, Student’s IEP did not reflect educational placement in a full-time vocational program, (b) Student’s IEP did not reflect either School B or School C as his location of services, and (c) Student’s IEP did not accurately reflect the number of service hours that he required to participate in either school.

The relief requested by Petitioner is as follows:³

(1) A finding of a denial of a FAPE on the issues as presented;

(2) FPCS to fund a Functional Behavioral Assessment (“FBA”) and within 10 days of receiving the completed FBA, FPCS to convene a Multidisciplinary Team Meeting (“MDT”) to review the FBA and revise Student’s IEP as appropriate, including revising Student’s Behavior Intervention Plan (“BIP”) to include the results of the FBA, as appropriate; and

² At the prehearing conference, Petitioner withdrew without prejudice the issue of whether FPCS denied Student a FAPE by failing to provide Petitioner with access to Student’s records by failing to provide Petitioner with copies of Student’s September 2013 and December 2013 IEPs, as was requested by Petitioner.

³ (1) At the prehearing conference, Petitioner sought to add the claim of tuition reimbursement for Student at New Beginnings Vocational School from 10/23/13 – 10/29/13. FPCS objected. The Hearing Officer determined that a tuition reimbursement claim was not stated in the complaint and could be added only via an amendment to the complaint. At the due process hearing, Petitioner once again attempted to add a tuition reimbursement claim to the litigation without amending the complaint. The Hearing Officer did not allow it.

(2) Petitioner’s request for an independent comprehensive psychological evaluation was withdrawn at the prehearing conference. Petitioner’s request for a Vocational Level II Assessment was withdrawn at the due process hearing.

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- (3) Compensatory education consisting of independent tutoring, mentoring and/or credit recovery courses; or
- (4) FPCS to provide funding for and Petitioner be permitted to reserve her compensatory education claim pending the completion of an independent assessment at market rate to determine appropriate compensatory education.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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. Student is a _____ resident of the District of Columbia. Petitioner is Student's mother.⁴ Since 02/28/13, Student was a child with a disability under the IDEA.⁵

#2. Student attended School A from the start of the 2012/13 SY until April 2013, when Student was advised that he could no longer attend due to his behaviors of repeated elopements from the classroom into the school building, violations of the school uniform code, and possession of a cellphone. Some of Student's behaviors resulted in suspensions and expulsions.⁶

#3. Student's initial IEP, developed on 02/28/13 at School A, provided for 24.5 hours/week of specialized instruction and 60 minutes/week of behavioral support services, with all services to be provided outside of general education. This was a full-time IEP; Student received no services within the general education setting.⁷ The number of hours on this IEP fit the class schedule for School A. At the time this IEP was developed, Student was commonly absent or late to class, demonstrated hyperactivity and difficulty staying on task, demonstrated verbal aggression towards staff or students when redirected, was very disruptive, and when presented with new class material,

Student's lack of self-control prevented him from attending to academic instruction and accessing the general education curriculum.⁹ The information available to the Multidisciplinary Team ("MDT" at that time that the initial IEP was developed did not support a placement in a full-time vocational program. Although Student had expressed a desire to be a mechanic, Student and Petitioner both expressed a strong interest in Student attending college. Student had demonstrated the aptitude to complete school work with appropriate supports.¹⁰

#4. Student's 02/28/13 IEP provided for 45 minutes/day of College and Career Preparatory (Advisory) for a one year period of time and 16 hours/year of field service trips. At

⁴ Petitioner.

⁵ R-4, R-12, R-13.

⁶ Student, Petitioner.

⁷ P-4-11, P-4-12, R-5.

⁹ R-4-9.

¹⁰ R-4, FPCS special education compliance director.

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the time of the development of the IEP, Student was enrolled in a College and Career Prep course at School A.¹¹ Student did not receive any of the transition services required by his IEP while at School B.¹²

#5. The Multidisciplinary Team (“MDT”) met in April 2013 and determined that Student would begin attending School B, which was a school program that operated under contract with FPCS.¹³ A Prior Written Notice was issued for School B which designated School B as the location where services were to be provided.¹⁴ School B was a program for students with behavioral management issues, such as Student.¹⁵ The program consisted of two self-contained classrooms populated with 5-6 students with full time IEPs, a special education teacher, a clinician and a behavior technician.¹⁶ School B had a school-wide Positive Behavioral Intervention Support Program.¹⁷ Petitioner was in favor of Student attending School B, but Student didn’t buy into it.¹⁸ From 06/06/13 until the end of the 2012/13 school year, which was a total of 12 school days, Student participated very minimally in the school program. Student repeatedly told school staff that he didn’t want to be at School B.

Student

was tardy during this 12 school day period and received very poor grades.

#6. Over the summer of 2013, Student received 1:1 tutoring from a special education teacher for 3 hours/day for 5 weeks, for a total of 72 hours.²¹ Student accessed the academic curriculum using the APEX computerized curriculum to assist with credit recovery. Student not only benefited from this instruction, he thrived. He mastered his IEP goals in reading and math labs with 80% accuracy.²² By the end of the 5 weeks of tutoring, Student had earned 6 course credits.²³ During the summer, Student had some behavior problems, but overall he was motivated to succeed. Student had been promised a cellphone from his mother if he did well over the summer.²⁴ Also, Student was of the opinion that if he did well over the summer, he could return to School A.²⁵

#7. At a Multidisciplinary Team (“MDT”) meeting on 08/22/13, Student was informed that he could not return to School A. FPCS proposed another School A campus program where Student could receive some vocational classes along with his academic classes, but Student

¹¹ R-4-17, R-4-18, R-41.

¹² Student, R-41.

¹³ R-18-1, School B Principal.

¹⁴ FPCS special education compliance director.

¹⁵ R-7, R-8, Petitioner,

¹⁶ Student, School B Director, R-8-2.

¹⁷ R-8-2.

¹⁸ Student, Petitioner, School B Director.

²⁰ R-27.

²¹ R-9-1.

²² R-9-6.

²³ R-41.

²⁴ R-10.

²⁵ Student, Petitioner.

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turned down the opportunity.²⁶ Student's long-term goal at that time was to attend college.²⁷ The MDT agreed that Student would return to School B because Student had only attended for 12 days, which was a very short period of time to gauge Student's overall adjustment. The MDT also agreed to reconvene in 60 days to take a look at Student's progress at School B. Petitioner wholeheartedly endorsed the team's recommendations.²⁸ In August 2013, a nonpublic school placement was inappropriate for Student because his IEP could be serviced at School B.²⁹

#8. Student returned to School B at the start of the 2013/14 school year,

Student showed little to no interest in completing school work and eloped from the classroom on a daily basis.³¹ Student had many behavioral incidents and several suspensions.³² The School B program consisted of two classrooms, and this was a source of irritation to Student who liked to leave the classroom and hide out in the school.³³ Student was tardy to school often because he didn't really want to attend.³⁴ School B employed many interventions to help Student improve his attendance during the 2013/14 SY; however, Student's attendance during the 2013/14 SY was so poor that it eventually resulted in a truancy referral to the court.³⁵

#9. In March 2013, a Behavioral Intervention Plan ("BIP") was finalized that was directed towards getting Student to follow behavioral directives, increasing his focus and time spent on tasks, using appropriate language and interpersonal skills, attending weekly counseling sessions, seeking out authority figures to address conflict, completing homework assignments, arriving in class daily and on time, and arriving at school and in the correct uniform. Behavioral strategies included but were not limited to praise, redirection, warnings, providing a calm de-escalation space, a daily behavior tracker, and maintaining consistent rules, routine and general expectations.³⁶ While at School B, Student had a daily behavior tracker/progress report that was kept by the teacher or behavior technician.³⁷ School B had a school-wide behavior management plan as part of the school program.³⁸ Petitioner offered no evidence that FPCS failed to implement Student's BIP.

#10. School B was capable of implementing Student's IEP during the 2012/13 SY and the 2013/14 SY. FPCS provided Student with all of the services in his IEP.³⁹ All specialized instruction in Student's IEP was provided to Student while Student attended School B during the

²⁶ Petitioner.

²⁷ R-10-4, Petitioner, FPCS special education compliance director.

²⁸ Petitioner, FPCS nonpublic placement monitor, R-10.

²⁹ OSSE placement coordinator.

³⁰ R-39, Student, Petitioner, School B teacher, FPCS nonpublic placement monitor.

³¹ Student.

³² R-39.

³³ Student, FPCS nonpublic placement monitor, School B Director.

³⁴ Student.

³⁵ R-31, R-32, R-33, R-34, R-35, FPCS nonpublic placement monitor.

³⁶ R-3-1, R-5-3.

³⁷ Student, R-38.

³⁸ R-8-2.

³⁹ School B SEC, School B Director.

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2012/13 school year and during the 2013/14 school year.⁴⁰ At all times, Student's classroom was taught by a special education teacher.⁴¹ Student simply refused to participate in the services offered.⁴² Student didn't like working on the APEX computerized curriculum at School B and disengaged from instruction after 10 minutes.⁴³ When Student voluntarily participated in the Intermediate Alternative Setting at School B in order to get out of his assigned classroom, he was provided with specialized instruction via the APEX computerized curriculum and a special education teacher.⁴⁴ When at the principal's office on one occasion, Student was provided with the APEX computerized curriculum, but he refused to use it.⁴⁵

#11. Behavioral support services were provided to Student at School B in accordance with Student's IEP, but Student elected not to participate with the assigned service provider. Instead, he chose to avail himself of the services of the SEC, who was a psychologist. Student received behavioral support services outside of general education with the SEC at least 60 minutes/week.⁴⁶ Student refused music and art therapy, which were available behavior support services at School B. The counseling that Student received at School B was appropriate and addressed Student's behavioral needs in that it addressed day-to-day matters that occurred in the school environment. Student needed therapy to address issues that occurred outside of school; however, those issues were more appropriately addressed through community based therapy and not through school counseling.⁴⁷

#12. On 09/20/13, at the request of Petitioner and before the 60 day review period had expired, FPCS initiated efforts to convene a meeting to address Petitioner's concerns about Student's adjustment at School B.⁴⁸ It was through no fault of FPCS that the meeting did not take place until October 2013. On 10/18/13, FPCS referred Student's case to the Office of the State Superintendent ("OSSE") for a change in placement to a nonpublic school with intensive behavioral modification supports to meet Student's behavioral and academic needs.⁴⁹ A meeting to change Student's setting to a more restrictive environment took place on 10/25/13. Student attended the meeting by telephone and for the first time, expressed his desire to participate in a full-time vocational program.⁵⁰ The team determined that Student still required a full-time IEP outside of general education. At that time, Student had already attended a week long orientation at School C. A Notice of Location Assignment to a full time vocational program, School C, was issued by OSSE the very next day on 10/26/13. The location of assignment at School C was based on Student's educational needs and desires. No changes were made to Student's IEP.⁵¹

⁴⁰ School B SEC.

⁴¹ School B SEC, School B Director.

⁴² Student, School B Director, School B teacher.

⁴³ Student, School B teacher.

⁴⁴ School B teacher.

⁴⁵ Student.

⁴⁶ Student, Petitioner, School B SEC.

⁴⁷ School B SEC.

⁴⁸ R-11, FPCS nonpublic placement director.

⁴⁹ R-15-1, R-16-1.

⁵⁰ Student, OSSE placement coordinator, R-20.

⁵¹ OSSE placement coordinator, R-22.

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#13. Student's 02/28/13 IEP, that provided for 24.5 hours/week of specialized instruction outside of general education, did not have to be modified or changed for Student to enroll in and attend School B or School C. 24.5 hours/week of specialized instruction is a full-time placement. Both school programs supported a full-time out of general education IEP.⁵² (Berry) The number of hours for a full-time placement can vary from school to school depending on the length of the school day. 24.5 hours/week of instruction matched the class schedule at School B. Student attended School C beginning on 10/26/13 with his 02/28/13 IEP.⁵³ There was no evidence in the record that School C was unable to implement Student's 02/28/13 IEP or that the number of hours in the IEP had to be changed in order for Student to participate in the program at School C.

#14. Funding of School B was rescinded in October 2013; however, pursuant to a contractual agreement between FPCS and School B, School B continued to offer all of Student's IEP services to Student until Student transferred to School C on 10/26/13.⁵⁴ Student barely took advantage of the services offered during that time period. In October 2013, Student barely came to school. In October 2013, when Petitioner found out that funding was rescinded, she stopped sending Student to school because Student didn't want to be there anyway. Petitioner began looking for a new school for Student and during the week preceding 10/26/13, Student attended an orientation at School C during which time he was unavailable to access the services at School B.⁵⁵

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 overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making

⁵² FPCS special education compliance director.

⁵³ FPCS special education compliance director.

⁵⁴ School B Principal.

⁵⁵ Petitioner.

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process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The first issue to be determined is whether FPCS denied Student a FAPE by failing to implement Student's Individualized Education Program ("IEP") while Student attended School B:

(1) From 06/06/13 until the end of the school year and from the beginning of the 2013/14 school year until 10/26/13; in that,

(a) Student did not receive some or any specialized instruction per his 02/28/13 IEP that required all specialized instruction services outside of general education, in that specialized instruction was not provided by a special education teacher; and

(b) Student did not receive 1 hour/week of behavioral support services per his IEP, in that (i) the counseling provided did not meet his behavioral needs, and (ii) services may not have been provided in the quantity prescribed by the IEP; and

(c) the use of a computer program blended model for instruction was inappropriate because Student did not receive any educational benefit from it; and

(d) no transition program services were made available to Student; and

(e) Student's Behavioral Intervention Plan was not implemented; and

(f) FPCS failed to provide specialized instruction to Student during the times he was put out of the classroom due to his behavior; and

(2) From 10/01/13 through 10/26/13, in that the program at School B was unavailable to Student due to funding being rescinded.

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with the IEP. 34 C.F.R. 300.17.

Each public agency must ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2).

(1) (a) Petitioner failed to meet her burden of proof on the allegation that specialized instruction was not provided to Student by a special education teacher at School B from 06/06/13 through the end of the 2012/13 school year and from the beginning of the 2013/14 school year until 10/26/13. The testimony of School B Director was credible and undisputed that Student's teacher in the self-contained classroom at School B was a special education teacher. At all times that Student used the APEX computerized curriculum while in the intermediate alternative classroom at School B, a special education teacher was available to assist him. The record is not clear as to whether a special education teacher was available to assist Student while he was in the principal's office; but even if there wasn't, that one instance would not arise to the level of a denial of a FAPE. Besides, Student, by his own admission, refused to use the APEX computerized curriculum on that day anyway.

(b) Petitioner failed to meet her burden of proof that Student did not receive the behavioral support services required by his 02/28/13 IEP, which was 1 hour/week outside of

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general education. The behavioral support services provided by School B, i.e., counseling in school to address Student's problems in school, were sufficient to meet Student's needs. At all times, behavioral support services were made available to Student; however, Student declined to participate with the assigned service provider. Student testified credibly that he refused to talk to his assigned behavioral support services provider. Instead, Student sought the ear of the SEC, a psychologist, whom he spent a lot of time talking to about school concerns for at least an hour each week outside of general education. The SEC's testimony was credible and logical that behavioral support services consisting of addressing school concerns was appropriate and that clinical therapy for Student, which he needed, was inappropriate for school based counseling. The behavior support services provided to Student by the SEC were in accord with the quantity provided by the IEP. The Hearing Officer also determines that the nature of the behavioral support services received by Student were appropriate and met Student's educational needs. The fact that Student specifically sought out the SEC on a more frequent basis that was required by the IEP attests to the appropriateness of the counseling received.

(c) Petitioner failed to meet her burden of proof that the use of a computer blended model for instruction was inappropriate because Student failed to receive any educational benefit from it. Student used the APEX computerized curriculum, with the 1:1 assistance of a special education teacher, quite successfully over the summer of 2013 and earned 7 course credits over a 5 weeks period.

From 06/06/13 until the end of the 2012/13 school, there were only 12 possible school days that Student could have received instruction. During those twelve days, Student was either not present in school or class, and when he was present, he participated minimally in the services offered.

During the 2013/14 school year, Student did not want to be at School B and he refused to buy into any educational opportunity offered, including the use of the APEX computerized curriculum. Student testified very credibly that he disengaged from the APEX computerized curriculum after about 10 minutes because he didn't want to be at School B. The Hearing Officer determines that Student was able to receive educational benefit from the use of the APEX computerized curriculum, but he chose not to.

(d) Student's 02/28/13 IEP provided for 45 minutes/day of transition services. At School A, when the IEP was developed, Student had a daily 45 minute class that addressed transition services. At School B, no transition services were provided to Student. This total failure to provide transition services while Student attended School B was a failure to implement a significant provision of the IEP. It constituted a procedural violation of the IDEA.

A party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or

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significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *Catalan et al., v. District of Columbia*, 478 F Supp 2^d 73 (2007), 47 IDELR 223.

Despite FPCS' procedural violation of the, Petitioner failed to meet her burden of proof that that FPCS denied Student a FAPE. Ordinarily, such a material deviation would constitute harm. In this case, Petitioner offered no evidence of harm by FPCS' omission and it is likely that none could be proven. Student didn't like School B, Student was absent from school to the point of being referred to court for truancy, and when he was in school, he did not participate in classwork or complete assignments. The School B SEC was sincere and credible on that point. Even if the transition services had been offered, it is unlikely that Student would have even accessed the curriculum by participating in the transition services offered. His flat out refusal to participate in any aspect of the School B program as an act of defiance, was clear. The Hearing Officer determines that Student was not denied a FAPE by FPCS' failure to provide Student with the transition services required by his IEP.

(e) There was insufficient evidence in the record for the Hearing Officer to conclude that FPCS denied Student a FAPE by failing to implement Student's Behavioral Intervention Plan ("BIP"). Student's BIP provided various strategies to address Student's many different problem behaviors at School B. Petitioner failed to offer any substantive evidence that the BIP was not implemented at School B, except the testimony of Student that he was not given any preferential tasks in class such as handing out papers. Although Student's testimony was credible, the absence of one preferential task hardly constitutes the denial of a FAPE. Handing out papers was just only one of many, many behavioral strategies to be employed. Moreover, the evidence in the record was very strong and clear that Student, by his own admission, was not going to cooperate or participate in any activities offered by School B. Petitioner failed to meet her burden of proof that Student was denied a FAPE by FPCS' failure to implement Student's BIP.

(f) The evidence revealed that Student was only sent out of the classroom once and sent to the principal's office where he was given access to the APEX computerized curriculum. In that instance, Student refused to use APEX. By Student's own testimony, he voluntarily eloped from the classroom on a daily basis, he was not put out of the classroom. At all times, Student was provided with the APEX computerized curriculum along with a special education teacher for instruction when he was not physically located in his classroom, but Student willfully refused to access the curriculum. Petitioner failed to meet her burden of proof that FPCS failed to implement Student's IEP when Student was put out of the classroom.

(2) Petitioner also failed to meet her burden of proof that the program at School B was unavailable to Student from 10/01/13 through 10/26/13 because funding for the program had been rescinded. Although funding for School B was rescinded in early October 2013, School B continued to operate and offer services to all of its students until all students were placed in another school program. The testimony of the School B Principal was credible that the services in Student's IEP were made available to Student from 10/01/13 through 10/26/13, but Student was rarely available to take advantage of the services. Petitioner had stopped sending Student to School B; rather, she had begun looking for a new school. For the week preceding 10/26/13, Student did not attend School B because he was attending orientation at School C.

Hearing Officer Determination

The second issue⁵⁶ to be determined is whether FPCS denied Student a FAPE by failing to provide Student with an appropriate IEP; specifically, (a) from 06/06/13 through the end of the 2012/13 SY and from the beginning of the 2013/14 school year until 01/17/14, Student's IEP did not reflect educational placement in a full-time vocational program, (b) Student's IEP did not reflect either School B or School C as his location of services, and (c) Student's IEP did not accurately reflect the number of service hours that he required to participate in either school.

The IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports that will be provided to enable the child to advance appropriately towards attaining annual goals and to be involved in and make progress in the general education curriculum. 34 C.F.R. 300.320(a)(4).

DCPS is required to place a student with a disability in an appropriate special education school or program that comports to the requirements of IDEA and District of Columbia municipal law. 38 D.C. Code 2561.02.

(a) Student's IEP, dated 02/28/13, was in effect from 06/06/13 through the end of the 2012/13 SY. It provided for full-time special education services outside of general education. Student's career path was divided between seeking a vocational trade and going to college. In February 2013, both Student and Petitioner wanted Student to pursue a path that would enable Student to attend college. Student did not express an interest in attending any type of vocational program until 10/25/13. On 10/25/13, the MDT agreed that School C, a full-time vocational program, was an appropriate location of services for Student. School C serviced a full-time IEP, which is what Student had. Student's IEP was never changed to reflect a full-time vocational program. It was unnecessary. Student received the services that were appropriate for him at School C from 10/26/13 onwards. Prior to 10/25/13, while Student attended School B, Student had no interest in attending any type of vocational program. Student was not denied a FAPE because his IEP did not reflect a full-time vocational program during the time that Student attended School B.

(b) An individualized education program (IEP) is the primary vehicle for providing students with the required FAPE. *S.H. v. State-Operated School of Dist. of the City of Newark*, [336 F.3d 260](#), 264 (3d Cir. 2003). "The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive." *Polk v. Central Susquehanna Intermediate Unit 16*, [853 F.2d 171](#), 173 (3d Cir. 1988).

In the Student Information section of the IEP is a data field for School/Site. That field lists a student's current school or site of attendance. When Student transferred to School B and subsequently to School C, Student's IEP was not changed or amended to show his new location of services. The lack of the correct site on the IEP did not affect the appropriateness or implementation of the IEP. Petitioner failed to prove a procedural violation of the IEP. While in some cases, the failure to include a specific site location on the IEP may result in a substantive denial of a FAPE, this was not one of those cases. Student's IEP was fully implemented at

⁵⁶ Petitioner indicated that Issue #3 was pled in the alternative to Issue #2.

Hearing Officer Determination

School B and there was no evidence in the record that Student's IEP was not implemented at School C. FPCS' failure to reflect the correct school/site location in the Student Information section of the IEP did not result in the denial of a FAPE. The omission did not affect quantity and nature of services to be provided.

(c) The evidence in the record revealed that the number of service hours in Student's 02/28/13 IEP was consistent with the number of class hours available at School B. School B could implement Student's IEP of 24.5 hours/week of specialized instruction outside of general education. Petitioner's allegation was without merit. The number of service hours available at School B matched Student's IEP. Petitioner failed to meet her burden of proof with respect to School B.

School C provided full-time special education services outside of general education. Student's IEP was a full-time IEP outside of general education. Petitioner never proved that Student couldn't participate in School C due to the number of hours on his IEP or that Student was harmed in any way because the 02/28/13 IEP was not updated to reflect the actual service hours received. Petitioner failed to meet her burden of proof on this aspect of the issue as well.

ORDER

Petitioner failed to meet her burden of proof on all of the issues presented.

This complaint is **DISMISSED WITH PREJUDICE**.

All requested relief is denied.

IT IS SO ORDERED.

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).

Date: April 1, 2014

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner: (U.S. mail)

Petitioner's Attorney: Nicholas Ostrem, Esq. (electronically)

FPCS' Attorney: Ellen Dalton, Esq. (electronically)

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SHO (electronically)