

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

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

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a boy who is eligible for services as a student with multiple disabilities.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on February 12, 2014 in regard to the Student. This Hearing Officer was appointed to preside over this case on February 18, 2014.

A response was filed by the District denying these contentions on February 19, 2014. A resolution meeting was not held in this case. The resolution period ended on March 13, 2014, when the parties signed an agreement to waive resolution. (IHO Exh. 1)

On March 7, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on March 8, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issues in the case.

The matter was heard on March 13 and 14, 2014.

Petitioner entered into evidence exhibits 1--47, 49-64, 65-74; Respondent entered into evidence exhibits 1-8. Petitioners presented as witnesses: the parent; Witness A, a psychologist; Witness B, an educational consultant; Witness C, the Associate Head of School B. Respondent presented as a witness: Witness D, Compliance Manager.

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.

ISSUES

As identified in the Prehearing Conference Summary and Order, the issues to be determined are as follows:

1. Did the Student require a more restrictive setting than was recommended in the May 14, 2013 IEP and the June 18, 2013 IEP? If so, did DCPS deny the Student a FAPE by these IEPs and the corresponding assigned placement at School A?
2. Did the May 14, 2013 and June 18, 2013 IEPs fail to include sufficient social/emotional goals for the Student? If so, did DCPS deny the Student a FAPE?

3. Were the May 14, 2013 and June 18, 2013 IEPs based on an insufficient FBA? If so, did DCPS create an insufficient BIP for the Student? If so, did DCPS deny the Student a FAPE?

4. Did DCPS fail to identify the Student as a Student with a disability and provide the Student with appropriate special education services during the two years prior to the filing of the Complaint through April, 2013? If so, did DCPS deny the Student a FAPE?

5. Did DCPS fail to provide the Student with sufficient occupational therapy for the 2013-2014 school year at School A? If so did DCPS deny the Student a FAPE?

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 is eligible for services as a student with multiple disabilities. (P-40-1)

2. The Student has issues with social issues, anxiety and depression. (Testimony of Witness B)

3. The Student is diagnosed with Adjustment Disorder with Mixed Emotional Disturbances of Emotions and Conduct and, Attention Deficit Hyperactivity Disorder, Combined Type, Disorder of Written Expression, and Reading Disorder (Mixed Dyslexia). (P-27-39)

4. He gets increasingly belligerent if given limits. (P-27-18; Testimony of Witness A)

5. The Student has executive functioning issues. (Testimony of Witness A)

6. Testing by DCPS on the WJ-III revealed that the Student's broad math scores were a 101, broad reading was a 96, and broad written language was a 96. (P-28-8)

7. The Student has “major” difficulties with writing. (Testimony of Witness A)
8. The Student’s writing fluency is very low. He has a hard time organizing the work. (Testimony of Witness C)
9. The Student has a reading disorder. (Testimony of Witness A)
10. In reading, the Student is at the 2nd to 3rd grade level. (Testimony of Witness C)
11. The Student’s greatest strength is math. He is about the 3rd grade level in math. (Testimony of Witness C)
12. The Student needs to learn with a special education teacher in an intense special education program in small non-traditional classroom setting with a high level of hands on work. (P-27-39)
13. The Student requires a Functional Behavior Assessment (FBA) to inform positive behavior modifications through the reduction of triggers and reinforcing consequences. (P-27-40)
14. The Student needs multi-sensory instruction and room to be active in the classroom. (Testimony of Witness C)
15. The Student had severe behavior problems at School A in the 2011-2012 school year, his first grade year, including ripping up paper, work refusal, and running out of the room. Once he became frustrated, he would not do the work. (P-2-3-4, P-4-2, P-5-1-2, P-6-1-3)
16. A school support team (SST) meeting was called for the Student on December 8, 2011 to address the Student’s behavior. (P-3-1)
17. The meeting resulted in strategies such as a communication log, a chart, a counselor pass, and a “take a break” spot. (P-4-2, 5-5)

18. Afterward, the Student made some advances but continued to have difficulties. The parents and the DCPS staff team talked about identifying triggers to assist in identifying the reasons behind Student's behavioral issues. (P-4-2)

19. The Student's report card for 2011-2012 indicated that he was below the standard in math and english language arts, and generally at the standard in other subjects such as social studies and science. Work habits and personal and social development required frequent prompting in many respects. (P-7-1-2)

20. Teachers indicated that he needed to get his behavior under control. He did not participate well in group lessons and would not do individual work. (P-7-3)

21. For the 2012-2013 school year, in the second grade, the Student continued to have difficulties following class routines and was disruptive, noncompliant and off task. He did not follow adult directives to start or complete assignments. He was easily frustrated by tasks. He would knock over and throw objects, rip and throw papers, and ignore adult directives. (P-12-1)

22. A Behavior Intervention Plan (BIP) was written for the Student on January 7, 2013. This BIP recommends breaking down assignments, providing alternate ways of responding, allowing the Student to be a helper, providing breaks, starting an assignment with the Student, allowing the Student to work with a preferred peer, counseling, a daily behavior chart, rewards including computer time, using the School A "Horseshow incentive program," providing computer time, getting treats. Consequences include getting a reprimand, a phone call home, school detention and loss of recess. (P-12-2-3)

23. The BIP included elements that had not worked previously. (Testimony of parent)

24. Petitioners referred the Student for special education in or about January 10, 2013.
(P-14)

25. Another SST meeting was held in February, 2013. (P-13-2)

26. A document entitled “Analysis of Existing Data” was produced in February, 2013. This document indicated that the Student struggles with reading fluency, comprehension and accuracy. It includes an observation when the Student was non-compliant and disrespectful. It indicates that the Student has difficulty with anger, frustration, and following rules. (P-21-1-3)

27. An assessment by psychologist Witness A dated March 19, 2013 indicated that a positive behavior plan including specific goals and expectations for each part of the day should be created. The psychologist indicated that the Student’s behaviors were due to Attention Deficit Hyperactivity Disorder (ADHD), Combined Type, as well as and discomfort around academic tasks. Witness A hypothesized that the Student acts out to avoid work. (P-26-1)

28. Witness A’s “preliminary plan” recommends a paraprofessional, pull-out services to address reading deficits, a medicine ball, frequent movement breaks, a flash pass for breaks, small group instruction, a clear outline of daily expectations, a manual activity, multi-sensory cueing, using a timer, and changing tasks. (P-26-1-3)

29. By March, 2013, the Student’s behaviors had not improved. The Student was acting very resistant to work, defiant, oppositional. He screamed, kicked, bit, and destroyed the classroom. (P-27-6)

30. The school would ask the parents to pick him up at this time. (Testimony of parent)

31. He was attending school only half days at the time. (Testimony of parent)

32. Testing by Witness A in March, 2013 indicated that the Student's Full Scale IQ on the WISC-IV was 102, in the average range. Weaknesses were found in processing speed. On the WJ-III, the Student's overall academic fluency was in the low average range (83), with an 82 standard score in math fluency, and an 89 standard score in reading fluency. Executive functioning difficulties were suggested from his scores in processing. The Student's score on the TOVA indicated that he had ADHD. Conners-3 questionnaire from the teacher indicated the Student was Clinically Significant in Attention Problems, Aggressive Behavior, Oppositional Defiant Problems, Conduct Problems, Externalizing Problems, and Total Problems. BASC-2 scores from the teacher indicated that the Student was clinically significant by teachers in the areas of Hyperactivity, Aggression, Conduct Problems, Attention Problems, Learning Problems, Adaptability, Externalizing Problems, School Problems, and Behavioral Symptoms. WIAT-3 testing indicated that total reading was at an 85 standard score, written expression a 91 standard score, mathematics at a 101 standard score, oral language at a 122 standard score, and listening comprehension at a 102 standard score. (P-27-10-57)

33. A report by Witness A recommended, inter alia, that the Student receive multi-sensory instruction, a social skills group, a small classroom setting with alternative learning techniques, a positive behavior plan, a functional behavioral analysis, and a paraprofessional. (P-27-39-40)

34. By determination dated 4/30/13, the Student was deemed eligible for services as Other Health Impaired, Specific Learning Disability, and Multiple Disabilities. (P-31)

35. An IEP meeting was held on May 14, 2013. At this meeting, some members of DCPS staff wanted to know if they could call 911 and hospitalize him upon an outburst. (Testimony of parent)

36. The IEP calls for 150 minutes per week of specialized instruction in the general education setting, with occupational therapy for 45 minutes a week, 30 minutes direct services, 15 minutes consultation. (P-36-9)

37. The IEP provided the Student with math goals, reading goals, writing goals, adaptive/daily living goals, emotional, social and behavioral development goals, and motor skills development goals. (P-36)

38. There are two emotional, social and behavioral goals. Goal 1 is that the Student engages in general education classes without disruption to his peers for 15 minutes. Goal 2 is that the Student follows directions and treats authority figures in the school with respect as evidenced by keeping a safe body and using safe words for 4 out of 5 times as an opportunity presents itself. (P-36-5-6)

39. The IEP indicates that the Student spends large blocks of 1:1 academic instructional time outside the classroom, with the goal of keeping him at school and learning for the full day. It indicates that, through the school year, he has spent a considerable amount of time with the Vice Principal and the Principal when his behavior was unsafe or excessively disrespectful. It indicated that he displayed consistent disregard to instruction, rules, redirection, motivational rewards, and requests. It indicated that he throws things, calls names, and has scratched the Vice Principal and at least one other staff member when he was angry. (P-36-5)

40. Accommodations in the IEP include location with minimal distractions, preferential seating, small group testing, breaks between subtests, extended time on subtests, breaks during a subtest. (P-36-11)

41. An amended IEP dated June 19, 2013 added a goal relating to reducing behaviors. An iPad was added. Behavioral support services were added for thirty minutes per week. An

additional 150 minutes of specialized instruction was added. Occupational therapy was increased to 120 minutes per month. (P-40-9, 11)

42. The IEP does not adequately address the Student's social and emotional concerns in the classroom. The team did not adequately acknowledge Witness A's report. Witness A attended the whole meeting. (Testimony of Witness A)

43. The Student's report card for 2012-2013 found that the Student was below basic in language arts, mathematics. Significant behavioral problems are reported; he was reported to be off task most of the day in the second term. (P-43-1-2)

44. The Student started at School A for third grade. His behavior was poor in Fall, 2013. He would hide in the building, engage in dangerous behavior, and "trash" offices. (Testimony of Witness B)

45. Staff had to physically hold him to make sure he was safe. (Testimony of Witness B)

46. The principal expressed concern about him. (Testimony of Witness B)

47. In late September, 2013, Petitioners went to School B at the suggested of Witness B. (Testimony of parent)

48. Petitioners requested home instruction on October 11, 2013 because of severe behavioral incidents at school. (P-52-1)

49. There was a new IEP meeting in October, 2013. Staff from School A indicated that the Student could not access the academic environment. He was fearful of attending school. The team added more services, but no FBA or BIP were written. (Testimony of Witness B)

50. At this meeting, a social worker at the school indicated that the Student needed to be in residential treatment and suggested places for the parents to consider. (Testimony of parent)

51. Petitioners asked for a full-time special education placement. The team agreed with this statement. (Testimony of parent)

52. An administrator of DCPS said that the Student needed certain interventions that were not available at School A. The administrator said he would get back to the parents or next steps. (Testimony of parent)

53. Thereafter, Petitioners were told that additional data needed to be collected. (Testimony of parent)

54. For the first term at School A, the Student's progress marks were 1 (below basic) in reading, writing and language, speaking and listening, and math. (P-56)

55. By October 15, 2013, Petitioners had decided to place the Student in a private school. (Testimony of parent)

56. The parents then put down a \$2500 deposit and later made monthly payments. (Testimony of parent)

57. On October 25, 2013, Petitioners provided notice to DCPS that the Student would be attending School B as of November 12, 2013. (P-55)

58. A December, 2013 meeting with Respondent resulted in a recommendation to increase services and for a full time behavior technician in the classroom. (Testimony of parent)

59. Petitioners were not given a location of services by the date of the hearing. (Testimony of parent)

60. The Student entered School B about a year below grade level, with many emerging skills. (Testimony of Witness C)

61. The school established a plan, with rewards, to get the Student to go to the school. He would first go to the Associate Director's office and then to the main office. (Testimony of Witness C)

62. This plan worked to get the Student into school. (Testimony of Witness C)

63. He is in a classroom with 9 students. There is a part time assistant teacher and 3 dedicated aides in the class. (Testimony of Witness C)

64. There is art therapy twice week at School B, for 30 minutes. (Testimony of Witness C)

65. The Student did not receive related services as part of the original plan by School B. However, by the time of the hearing, the Student did occupational therapy. (Testimony of Witness C)

66. The School offers "Eagle Pride," a school-wide behavior program designed to provide "positive input to create a safe classroom." This program develops work habits. The Student responds to this program. (Testimony of Witness C; Testimony of Witness A)

67. The school offers a "Second Step" program, which is designed to enable students to understand the perspective of others. (Testimony of Witness C)

68. A token economy system is used at the school. The Student earns points and his reward is usually a sensory toy. (Testimony of Witness C)

69. Behavioral systems at the school are geared toward following classroom routines, demonstrating positive interactions, and persisting at tasks. (Testimony of Witness C)

70. The school did need to do an FBA since the Student's behaviors had improved so much. (Testimony of Witness C)

71. The Student is taking a "best practice" program, which is a kind of multi-sensory reading program. (Testimony of Witness C)

72. The Student is benefitting from the positive structure at the school, where he can make predictions about what will happen. He is initiating, he conforms to behavioral rules, and he sustains attention for 15 minutes plus. (Testimony of Witness C)

73. The Student receives and benefits from "deep pressure" at the school. (Testimony of Witness C)

74. The Student needs to be "mildly" redirected at the school. (Testimony of Witness C)

75. The Student's teacher is certified in Maryland and just recently became certified in the District of Columbia. (Testimony of Witness C)

76. The school works on the Student's keyboarding skills and provides a scribe for him. (Testimony of Witness C)

77. The Student has not engaged in any serious behavior incidents at School B. (Testimony of parent)

78. Progress was reported in the first few weeks at School B in Language Arts, Math, and Guidance. (P-59-1-2)

79. An Individualized Learning plan was created for the Student on January 17, 2014 at School B. It was reported that the Student was showing good social and communication skills with adults and peers. Reading goals, writing goals, and mathematics goals were created for the student. (P-61)

80. The Student's progress performance review for January 24, 2014 indicated progress in reading and math, and the Student was responding to behavioral interventions at the school relating to impulsive control and problem solving. The Student was focusing on identifying impulsive behaviors, identifying strong emotions, demonstrating and practicing calming down techniques, offering several solutions for a given problem, evaluating whether a solution was working for him. (P-69-3)

81. A performance review on February 14, 2014 found progress inconsistent in language arts, but consistent in math. Continued progress was found in guidance. (P-71-1-2) An objective was mastered in language arts by February 28, 2014. Continued progress was reported in math and guidance. (P-74-1-2)

82. I found all the witnesses credible in this proceeding.

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 Sect. 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

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 conformance 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).

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).

The District may be required to pay for educational services obtained for a student by a student's parent if the services offered by the District are inadequate or inappropriate ("first criterion,") the services selected by the parent are appropriate ("second criterion"), and equitable considerations support the parent's claim ("third criterion"), even if the private school in which the parents have placed the child is unapproved. School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359 (1985); Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993).

On the first criterion, the District should show that it offered parents a FAPE. A FAPE is offered to a student when (a) the District complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits. While Districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural

inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits. 20 U.S.C. Sect. 1415(f)(1)(E)(ii); 34 C.F.R. Sect. 300.513(a)(2).

The Student's behavioral concerns were severe prior to the IEP meeting in May, 2013. Even since the behavior plan created by a teacher in January, 2013, the Student had been non-compliant and disrespectful. The Student had difficulty with anger, frustration, and following rules. The parents were being called to pick the Student up at school. The behavioral concerns were so significant that the Student was only attending school for half the day.

When in school, the Student was spending large blocks of 1:1 academic instructional time outside the classroom. He spent a considerable amount of time with the Vice Principal and the Principal. He threw things, called names, and even scratched the Vice Principal and at least one other staff member when he was angry.

Moreover, these behaviors were confirmed through testing. A Conners-3 questionnaire from a teacher indicated the Student was Clinically Significant in Attention Problems, Aggressive Behavior, Oppositional Defiant Problems, Conduct Problems, Externalizing Problems, and Total Problems. BASC-2 scores from a teacher indicated that the Student was clinically significant by teachers in the areas of Hyperactivity, Aggression, Conduct Problems, Attention Problems, Learning Problems, Adaptability, Externalizing Problems, School Problems, and Behavioral Symptoms

The Student also had academic issues. The Student's achievement testing scores were well below the levels reached in his IQ scores. While the Student has a Full Scale IQ of 102, his

overall academic fluency was an 83. The Student had been diagnosed with Disorder of Written Expression, and Reading Disorder (Mixed Dyslexia).

At the IEP meeting, these issues were discussed. Some members of DCPS staff wanted to know if they could call 911 and hospitalize the Student during an outburst. The IEP itself specifically references the Student's extreme behaviors, including that he would throw things, refused to comply with rules, and had attacked staff. The IEP also mentions that the Student was spending a lot of time in a 1:1 situation outside the classroom.

Still, the IEP recommended only a modest amount of special education services. The IEP June IEP recommended that the Student stay in a general education setting, with only a general education teacher, for most of the school day. There was no requirement in the IEP that the Student be educated with a special education teacher in the general education classroom except for 30 minutes per day. No paraprofessional was assigned to the Student.

The team did not adopt many of the recommendations from Witness A's thorough, well written report. In particular, the team did not recommend that the Student receive instruction in a small classroom or even receive small group instruction. The team also did not recommend that the Student receive multi-sensory instruction. The team also did not use a Functional Behavior Assessment for the Student, or create a new Behavior Intervention Plan to replace the clearly ineffective plan created by the teacher in January, 2013.

Courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's

education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) . The FBA should focus on the antecedents to the behaviors, on the theory that a change in the antecedents can lead to a change in the behaviors. C.F. ex rel. R.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *9 (S.D.N.Y. 2011); R.K. ex rel. R.K. v. New York City Dep't of Educ., 2011 WL 1131492 at *19 (S.D.N.Y. 2011). The information gleaned from the assessment is central to formulating an IEP tailored to the needs of individual disabled children. Harris, 561 F.Supp. 2d at 68.

In addition to an FBA, if the behavior of a student impedes the student's learning, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). According to DCMR Sect. 5-3007.3, an individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

Respondent contends that the parent agreed to the IEP, but the record reveals that the parent felt that the Student needed a full-time IEP at the time. Moreover, Respondent presents no authority to support the notion that a parent's assent to an inappropriate IEP inoculates an LEA from liability. See Letter to Lipsitt, 52 IDELR 47 (OSEP Letter December 11, 2008).

To this IHO, the IEPs in May and June, 2013 did not provide the Student with sufficient support for him to be able to succeed. Given the record before the team, an FBA should have been conducted, a new BIP should have been written and attached to the IEP, the Student should have received small class sizes and small group instruction. As written in May and June, 2013,

Respondent's program was likely to lead toward large blocks of 1:1 academic instructional time outside the classroom, and continued time with the Vice Principal and the Principal when his behavior was unsafe or excessively disrespectful. The IEPs were not reasonably calculated.¹ Petitioners prevail on the first criterion.

On the second criterion, parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. Florence Cnty. Sch. Dist. 4 v. Carter, 510 U.S. 7, 15 (1993). Parents in such situations may be reimbursed only if "the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate," 34 C.F.R. § 300.148(c) (2012); see also Florence Cnty., 510 U.S. at 15 (parent may only receive tuition reimbursement "if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act"); Holland v. District of Columbia, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement "where the public agency violated [the IDEA] and the parents made an appropriate placement").

The record establishes that the Student was hesitant to go to school after his experiences at School A in Fall, 2013. At School A, in third grade, the Student would hide in the building, engage in dangerous behavior, and "trash" offices. Staff had to physically hold him to make sure he was safe. The Student could not access the academic environment. A social worker at the school even indicated that the Student needed to be in residential treatment and suggested places for the parents to consider. An administrator said that the Student needed certain interventions that were not available at School A.

¹ I do not find that the Student's IEP goals were inadequate, as alleged. The IEP contains measurable social and emotional goals that are appropriate for the Student, including engaging in classroom activities without disruption, following directions, and treating authority figures with respect. The issue here is that Respondent did not provide the services for the Student to achieve these goals.

However, after Respondent recommended an increase in services in October and December, a location of services was not secured by Respondent. Even by the date of the hearing, Respondent had not come up with a place for this Student to be educated.

Petitioner placed the Student at School B in November, 2013. The unrebutted testimony of the parent and Witness C indicate that the interventions at School B have worked well for this child. The school devised a plan for the Student to become more comfortable in school again involving rewards and reporting first to the Associate Director's office. This plan has worked and the Student is no longer reluctant to go to school.

Moreover, the record indicates that the Student is responding to having small class size, more supervision, and appropriate sensory interventions. The Student is benefitting from the positive structure at the school, where he can make predictions about what will happen. He is in a classroom with only 9 students, with a part time assistant teacher and 3 dedicated aides in the class. He is also responding to the school's behavior programs, including Eagle Pride, a school-wide behavior program designed to develop work habits, and Second Step program, which is designed to enable students to understand the perspective of others. The Student is benefitting from a token economy system at the school. The Student is also responding to the school's academic interventions, including a "best practice" program, which is a kind of multi-sensory reading program. The Student is also benefitting from the positive structure at the school, where he can make predictions about what will happen. He is now initiating, conforming to behavioral rules, and sustaining attention for 15 minutes plus. In what has to be considered significant improvement, the Student only needs to be "mildly" redirected at the school. The Student has not engaged in any serious behavior incidents at School B, suggesting that a FBA and BIP are no

longer needed for him. Moreover, progress was reported in Reading, Language Arts, Math, and Guidance, and in social and communication skills.

Respondent objects that the parental placement is not in the Student's least restrictive environment ("LRE"). However, a parental placement need not be the least restrictive environment for a Student. N.T. v. District of Columbia, 839 F. Supp.2d 29 n.3 (D.D.C. 2012). Maintaining a less restrictive placement at the expense of educational benefit or safety is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994). Indeed, a recent Circuit court decision underscores that even where the student does not exhibit significant emotional issues, a self-contained placement can be deemed appropriate. C.L v. Scarsdale Union Free Sch. Dist., 2014 WL 928906 at *8-*12 (2nd Cir. March 14, 2014).

Still, it is appropriate for this IHO to assess whether this placement is the Student's LRE. N.T., 839 F.Supp.2d at 34-36 (affirming an HOD denying a tuition award on, inter alia, LRE grounds, notwithstanding a finding of FAPE denial) In this case, the record shows that Petitioners reacted appropriately to a situation where the child was at risk. Respondent had admitted that the Student was not doing well at his current school, but failed to provide the parents with any alternatives. There is nothing in the record to establish that Petitioners had any choice but to look for a private, special education setting to provide the Student with the interventions that were recommended by Witness A and others. It is not appropriate to bar reimbursement on LRE grounds in this case.

Accordingly, Petitioners prevail on the second criterion.

On the third criterion, the IDEA allows that tuition reimbursement may be reduced or

denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). With respect to a parents' obligation to raise the appropriateness of an IEP in a timely manner, the IDEA provides that tuition reimbursement may be denied or reduced, if parents neither inform the CSE of their disagreement with its proposed placement and their intent to place their child in a private school at public expense at the most recent CSE meeting prior to their removal of the child from public school, nor provide the school district with written notice stating their concerns and their intent with remove the child within ten business days before such removal. 34 CFR Sect. 148(d)(i), (ii). Under 20 U.S.C. Sect. 1412(a)(10)(C)(iii), a denial or reduction in reimbursement is discretionary.

Respondent argues that the Petitioners did not provide Respondent with appropriate notice, but the Petitioners did provide Respondent with a letter indicating that the Student would attend School B more than 10 days prior to the date that the Student was enrolled at the school. The record indicates that Petitioners tried out the public schools in good faith, allowed the Student to be assessed by the Respondent, faithfully attended all meetings, and only resorted to School B when no other options were feasible. The record suggests that no proper, less restrictive option was available to Petitioners. The equities favor Petitioners in this matter. Accordingly, I will order that Petitioners be reimbursed for tuition at School B for the 2013-2014 school year.

Petitioners also contend that Respondent did not meet its Child Find obligations to the Student from two years prior to the Complaint to April, 2013.

Among the specific conditions a state must satisfy is the requirement that it demonstrate that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated." 20 U.S.C. Sects. 1412(2)(C);1414(a)(1)(A); Integrated Design & Elecs. Acad. Pub. Charter Sch. v. McKinley, 570 F. Supp. 2d 28, 30 (D.D.C. 2008). This child-find obligation extends to all children suspected of having a disability, not just children who are ultimately found to have disabilities. McKinley, 570 F. Supp. 2d at 34-35 (citing 34 C.F.R. Sect. 300.111(c)(1); N.G. v District of Columbia, 556 F. Supp. 2d. 11, 25 (D.D.C. 2008) The scope of the child-find duty includes children who are suspected of having a disability even though they are advancing from grade to grade. Kruvant v. District of Columbia, 2005 U.S. Dist. LEXIS 34045, 25-26 (D.D.C. Aug. 10, 2005).

The duty to locate and complete the evaluation of a student starts as soon as a student is identified as a potential candidate for special education services. McKinley, 570 F. Supp. 2d at 28-30. The failure of an LEA to comply with its child find obligation may constitute a denial of FAPE. The dispositive issue is whether the student was harmed by the failure of the LEA to comply with its obligations. Kruvant v. District of Columbia, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"). In other words, to succeed on a procedural claim, a petitioner must demonstrate that the school district's procedural violations affected the child's ability to receive the educational benefit that the IDEA requires. See, e.g., Nguyen v. District of Columbia, 681 F. Supp. 2d 49, 51 (D.D.C. 2010) (upholding hearing officer who found that, although the student suffered from depression and a mood

disorder, he did not suffer an emotional disturbance because "[t]he record is, at best, inconclusive that [the student's] emotional problems adversely affect his educational performance").

Here, the record indicates that Respondent was on notice of the Student's significant behavioral issues in the classroom going back to at least December 8, 2011, when a Student Support Team met to discuss the Student's issues. At this time, the Student was running out of the classroom, ripping up his work, and was in need of interventions such as a communications log and a "calm down" space. This should have suggested to the District that this is a Student who might be eligible for services as a student with an emotional disturbance.

"Emotional Disturbance" is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4] adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 CFR Sect. 300.8 (c) (4) (i); 5-E DCMR Sect. 3001.1.

The Student was certainly engaging in inappropriate behaviors and feelings to a marked degree that adversely affected his educational performance. The only issue, it seems to this IHO, is whether those issues were manifesting themselves over a long period of time at that point. Given the extent to which the Student was misbehaving in the classroom, Respondent should have identified the Student, evaluated him, and then determined whether the Student was eligible for services. Respondent did not, and therefore violated the "Child Find" provisions of the IDEA.

Finally, Petitioners alleges that the Student did not receive his occupational therapy mandate at School A for the 2013-2014 school year.

“Failure to implement” claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23, 31, 32 (D.D.C. 2012)(holding no failure to implement where District’s school setting provided ten minutes less of specialized instruction per day than was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007).

The record does not clearly establish that occupational therapy was a “substantial” or “significant” portion of the IEP. Moreover, there is no documentary evidence to support Petitioner’s contentions that the Student did not get his occupational therapy at the school. Moreover, the Student was only at School A for about 6 weeks during the 2013-2014 school year. Under the circumstances, I decline to determine that the lack of occupational therapy should result in a finding of FAPE denial.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent denied the Student a FAPE through its IEPs dated May and June, 2013;
2. Respondent violated Child Find when it failed to locate, identify and evaluate the Student from February, 2012 through April, 2013;
3. Respondent is hereby ordered to reimburse Petitioners for all tuition and related expenses in connection to the Student's attendance at School B for the 2013-2014 school year.

Dated: April 28, 2014

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: April 28, 2014

Michael Lazan
Impartial Hearing Officer