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STUDENT HEARING OFFICE
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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

	Date Issued: December 26, 2012
Student,[1]	
Petitioner,	IHO: Michael Lazan
v.	Hearing Date: December 18, 2012
District of Columbia Public Schools,	Case No: 2012-0713
Respondent.	Room: 2008

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 October 12, 2012. This IHO was appointed to hear this matter on October 17, 2012. Respondent filed a Response to the Complaint on October 22, 2012, denying the allegations in the Complaint.

On October 26, 2012, a resolution meeting was held. The parties did not resolve the matter and did not agree to shorten the resolution period. The resolution period expired on November 11, 2012. The HOD was due on December 26, 2012.

A Prehearing Conference was held on November 21, 2012. A Prehearing Conference Summary and Order was issued on November 28, 2012.

[1] Personal identification information is provided in Appendix A.

A hearing date was set for December 18, 2012. This was a closed hearing. Petitioner was represented by Kiran Hassan, Esq. Respondent was represented by Linda Smalls, Esq. Petitioner entered into evidence exhibits 1-20; Respondent entered into evidence exhibits 1, 3-5. Petitioner presented as witnesses: Petitioner; [redacted], Psychologist; [redacted], Special Education teacher; [redacted], Tutor; [redacted] School D. At the end of the hearing day on December 18, 2012, the parties presented oral closing arguments.

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, [redacted], and eligible for services as a student with a specific learning disability. The Complaint alleges that DCPS failed to develop an appropriate IEP for the Student; DCPS failed to provide an appropriate placement for the Student; DCPS failed provide an appropriate transition/vocational assessment of the Student and develop appropriate post-secondary transition goals; DCPS failed to conduct an appropriate Functional Behavioral Assessment and Behavior Intervention Plan for the Student.

On the day of hearing, Petitioner withdrew her claim relating to an appropriate Functional Behavioral Assessment and Behavior Intervention Plan for the Student.

As relief, Petitioner seeks placement of the Student at School D for 2012-2013 and presents a compensatory education plan. Petitioner's Complaint also requests revision of the IEP.

ISSUES

The issues to be determined are as follows:

1. Does the Student require a small, full-time special education environment for his academic and social and emotional needs? If so, did the DCPS recommendation of January 19, 2012 for the Student to receive 19.5 hours of specialized instruction in the general education environment deny the Student a FAPE?

2. Can the recommended specific school placement of School C implement the January 19, 2012 IEP? If not, did DCPS deny the Student a FAPE by failing to provide the Student with an appropriate number of special education instruction hours?

3. Did the Student require a detailed vocational assessment and meaningful post-secondary goals in the January 19, 2012 IEP? Did the January 19, 2012 IEP contain a detailed vocational assessment and meaningful post-secondary goals? If so, did the lack of a detailed vocational assessment and meaningful post-secondary goals result in FAPE denial?

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 [redacted] who is eligible for services as a student with a specific learning disability. (P-4-1)

2. Per the Student's most recent IEP on January 19, 2012, the Student is functioning on a kindergarten to first grade level in terms of reading text. This is measured through the DC-BAS and on the SRI. (P-4-3; P-6-2)

3. The Student cannot spell many four and five letter words. (Testimony of Petitioner)

4. In reading, texts need to be broken down and modified for the Student. The Student has difficulty sounding out words and often mixes up basic consonant sounds and pairings. The Student struggles with multi-syllabic words. Decoding key vocabulary and identifying context clues is difficult for the Student. (P-4-3; P-6-2-3)

5. The Student experiences challenges when being asked to read out loud. (P-4-3)

6. The Student needs many prompts to read independently, even with a modified text. (P-4-3)

7. The Student's difficulties in reading and decoding often lead to off-task behavior and frustration with teachers. (P-4-4)

8. During classroom instruction generally, the Student often gives up and is hard to re-engage. (P-4-3)

9. The Student needs redirection in class. (P-4-3)

10. In writing, the Student is able to write complete sentences and some words from sight memory. When given word banks and structured activity, the Student is able to formulate some written responses that are grammatically correct but will make mistakes. (P-4-4)

11. The Student's written samples are often incomplete due to a lack of understanding. He has trouble formulating simple responses to prompts. When writing, the

Student has difficulty differentiating between singular and plural nouns and will often add extra letters to words. (P-4-4)

12. The Student needs to work on basic spelling and sentence structure. The Student needs to write out key vocabulary words and break down words into syllables as part of his spelling strategy. (P-4-4)

13. The Student has limited fluency in math. He is able to add, subtract and multiply most single digit and double digit numbers, but only with support. He has difficulty computing independently and does not produce the correct answers automatically.
The Student requires clear instructions and organization when computing. The Student cannot do division and cannot compute three digit numbers. (P-4-2; P-6-3; Testimony of Petitioner)

14. Regarding the Student's speech, the Student has difficulty producing grammatically correct sentences using conjunctions and adverbs, has difficulty using core vocabulary words appropriately in sentences . (P-4-5)

15. Additionally, the Student lacks pragmatic language skills. (P-9-3)

16. As a result of his academic difficulties, the Student avoids school and has difficulties with attendance and participation. (P-4-5; Testimony of [redacted]; Testimony of Petitioner)

17. School work is a source of stress for the Student. (P-6-1)

18. The Student's truancy is due to his inability to function in school. (P-9-3)

19. The Student often fails to finish what he starts in school. There is little work in school that he enjoys. He cannot concentrate or pay attention often. The Student cannot understand most of the work in his general education classes at school, even with special education assistance. Since he cannot understand the work at school and makes no progress, the

Student no longer wants to go to school or put forth much effort in school. (Testimony of [redacted]; Testimony of Petitioner; P-9-3, 5)

20. In school, the Student will congregate with others who will get him in trouble. He is self-conscious, easily embarrassed. (P-10-7)

21. The Student falls asleep in class. (P-11-1)

22. The Student is not interested in any particular occupation. He is interested in attending college/university or getting a job after high school. (P-4-11)

23. For 8th grade for 2009-2010, the Student went to School A. The school was not demanding, and the Student was in general education classes. (Testimony of Petitioner)

24. For the 9th grade for 2010-2011, the Student attended School B, with general education classes. Classes were more demanding than in middle school and the Student's performance suffered. There was too much pressure on him. (P-6-1; Testimony of Petitioner)

25. In the Student's IEP dated January 7, 2011, the Student was recommended for 15 hours of specialized instruction in the general education setting, with speech and language pathology for 45 minutes per week. (P-5-8)

26. The Present Levels of Educational Performance section of the IEP for Mathematics reads: "[Student] has difficulty ordering operations and computing. He is able to compute (add, subtract, multiply and divide) most single digit and double digit numbers. [Student] has difficulty computing independently, and does not produce correct answers automatically. His strengths in mathematics tend to be in graphic skills and plotting numbers and computing equations with visual representations or graphic organizers." (P-5-3)

27. The Goals for Mathematics indicate: 1) "Use number lines to represent negative numbers with 80% accuracy;" 2) "Given a simple equation, use the order of operations to obtain

the correct answer (i.e., multiplication before addition) with 80% mastery;" 3) "Use a number line to demonstrate the process of solving a problem with 80% mastery;" 4) "Apply the Order of operations for addition, subtraction, multiplication, and division when solving problems with 80% mastery." (P-5-3)

28. The Present Levels of Educational Performance section for Reading reads: "According to his DCBAS testing and his SRI, [Student] has a difficult time reading text. He currently functions at a K-1st grade level. Texts often need to be broken down and modified for him. He has a difficulty sounding out words and often mixes up basic consonant sounds and pairings. Teachers have noticed he often struggles with multi-syllabic words. Decoding vocabulary and identifying context clues is also difficult for [Student]. [Student] is able to identify main ideas and passages when read aloud and gives appropriate oral responses to questions and prompts. Another strength is [Student's] ability to identify descriptive words and authors purpose given normative text excepts. [Student's] teachers has also noted that part of his trouble with reading might be attributable to classroom behavior." (P-5-4)

29. The Goals for reading indicate: 1) "[Student] will Compare and contrast the central ideas, problems, or situations from readings on a specific topic selected to reflect a range of viewpoints with 80 % mastery;" 2) "Respond appropriately to a set of instructions and complete a task with 80% mastery;" 3) Recognize the basic patterns of English sentences (e.g., noun-verb, non-verb-noun, noun-verb-noun, noun-verb-non-noun, noun-linking verb-noun with 80% mastery;" 4) "Restate main idea and facts from text heard of read with 80% mastery;" 5) "Use letter-sound knowledge to decode written language and read fluently and comprehend grade appropriate text with 80% mastery." (P-5-4-5)

30. The Present Level of Educational Performance for Written Expression indicate: "Currently [Student] is able to write some words from sight memory. [Student] is able to write complete sentences with the correct punctuation and capitalization. When given word banks and structures activity, [Student]is able to formulate some written responses that are grammatically correct. [Student's] written samples are often incomplete due to lack of understanding. When writing, [Student] has difficulty differentiating between singular and plural nouns and will often add extra letters to words. His strengths revolve around his ability to organize words and simple sentences with the use of a graphic organizer." (P-4-5)

31. Goals for written expression indicate: 1) "[Student] is able to write a multi-paragraph essay with logical organization, proper sentence structure and supporting details with 80 % accuracy;" 2) "Organize two or more objects, pictures, drawings, or words in an order that makes sense with 80% mastery;" 3) "Identify information that is related to a topic and information that is unconnected with 80% mastery;" 4) "Recognize that stories have a beginning, middle and end with 805 mastery. " (P-4-5-6)

32. The Student was suspended several times during the 2010-2011 school year at School B, including for walking the halls, leaving school without permission and for fighting. The Student would curse in school, act disrespectfully in school. Attendance was poor. (P-6-2; P-7-2)

33. At School B during the 2010-2011 school year, the Student refused to go to counseling, did not come to school on time, but would put forth effort on occasion. The Student had a great deal of difficulty in English, and had trouble focusing on work for more than a few minutes. He would often refuse to work and refuse offers of help. (P-6-2; P-7-1-2)

34. The Student had difficulty concentrating in class at School B. The Data Evaluation Review by [redacted], a DCPS Psychologist, references a teacher, [redacted] who indicates:

> The Student population in my class is around 30 students. [Student] would probably have difficulty focusing in a class half that size, so this contributes greatly to his inability to concentrate. He also has reading and reasoning difficulties which hinder his progress. (P-6-2)

35. For the 2010-2011 school year at School B, the Student received mostly F and D grades, with reports of excessive absences, incomplete assignments, poor behavior. (P-12-1)

36. When the Student was at School B, he was in a few fights, was being bullied, was withdrawn, did not sit still. (Testimony of Petitioner)

37. The Student was retained in ninth grade. The Student had become truant at school. The Student then attended School C for 2011-2012. (P-9-2)(Testimony of Petitioner)

38. While at School C, the Student considered it safe, originally liked it but then did not do much work. Petitioner began to get calls about truancy even though she dropped him off at the school. (Testimony of Petitioner)

39. An FBA of the Student was conducted by [redacted], Ph.D on December 15 and 16, 2011. This FBA identified behaviors that contribute to the Student's underachievement at school. The FBA indicated that the Student is challenged in focusing his attention on the task at hand, has deficits in planning ahead, has deficits in organization of materials, has deficits in modeling social behavior, engages in escapist behaviors such as cutting class or truancy. (P-9-1-3)

40. The FBA indicates that the antecedents to these behaviors are a classroom with a large number of students, assignments that are above the Student's academic level, instructional material that is presented without the use of organizers, an overall school context that has lapses

in pupil management, and a school environment that does not adhere to the "wrap around" model of instruction. (P-9-4)

41. [redacted] determined that the Student has social skills issues and executive functioning issues, based on Conners testing. (Testimony of [redacted])

42. The FBA also indicates that the Student has difficulties relating to inattention, executive functioning, anxiety, retention of information, as measured by Conners-3 testing, Beck Youth Inventories, Sentence Completion testing, and a parent checklist. (P-9-2)

43. The FBA also indicates that the Student presented with ADD. (P-9-3)

44. [redacted] recommended individual therapy, group therapy, vocational training classes to gain skills to help prepare him for employment, mentoring. (P-10-9)

45. [redacted] recommended a small classroom environment where the Student can receive daily vocabulary building exercises. (P-10-10)

46. [redacted] recommended a class in self-advocacy skills. (P-10-10)

47. [redacted] recommended checking in with a school counselor to insure that the Student will attend school regularly. (P-10-10)

48. During an observation by [redacted] on December 21, 2011, the Student did not do any work, had a flat affect, was not engaged. (P-9-3)

49. In the Student's next IEP, dated January 19, 2012, the Student was recommended for 19.5 hours of specialized instruction in the general education setting, with speech and language pathology for 120 minutes per month. (P-4-8)

50. Academic levels are the same as those reported in the January 7, 2011 IEP. The language in both IEPs is exactly the same in terms of math levels, reading levels, writing levels.

The language in both IEPs is exactly the same in terms of math goals, reading goals, writing goals, math levels, reading levels, and writing levels. (P-4-4-8; P-5-3-7)

51. Recommended accommodations on this IEP include repetition of directions, small group testing, flexible scheduling, extended time on subtests. (P-4-9)

52. Post-secondary activities in the IEP include attending a vocational school, seeking out an internship within the community. (P-4-12)

53. Post-Secondary goals in the IEP include identifying and exploring the requirements of 3-5 vocational schools, seeking out required internships. (P-4-12)

54. In the IEP, the Student's course of study relating to his post-school goals includes classes in algebra, English, environmental science, world geography, advisory, and forensics. (P-4-12)

55. The Student is recommended for "advisory" as a transition services, 60 minutes per day. (P-4-13)

56. For the 2011-2012 school year at School C, the Student received three Fs and a D first term, and 7 Fs and a D second term. There were reports of excessive absences, poor behavior. (P-12-2-3)

57. For the 2011-2012 school year at School C, the Student was engaged in many disciplinary incidents including for lateness, unauthorized presence in the hall, obscene behaviors, academic dishonesty, fighting. (P-15-1)

58. The Student started classes at School C for the 2012-2013 school year. (Testimony of Petitioner)

59. For the 2012-2013 school year, from August 20, 2012 to October 16, 2012, the Student was absent from school for 56 days and late for 14 days. (P-16-1)

60. School C cannot satisfy the 19 hours of special education as mandated on the Student's IEP. (Testimony of [redacted]; P-17-4)

61. For the 2012-2013 school year, School C services the Student by providing a special education coordinator named [redacted], who pushes into English for 71 minutes a day. Additionally, a [redacted] pushes into math for 71 minutes a day. (Testimony of [redacted])

62. Classes at School C have as many as 30 students in them. (Testimony of [redacted])

63. The Student runs in the hallways at School C. (Testimony of [redacted])

64. Student is failing most of his classes this school year at School C. (Testimony of [redacted]; P-12-3)

65. The Student's draft BIP dated October 24, 2012 and also December 10, 2012 recommended a daily form to be developed and signed by the teacher to track the Student's attendance. The BIP also requires the teacher to review the Student's agenda book to ensure that the correct homework assignment was recorded. The BIP requires "proximity control" to make sure the Student is awake in class. Every 5-10 minutes, the Student was to stand up and stretch to prevent falling asleep. The Student was to receive individualized attention when the Student requires a time-out from the classroom. The Student was also to receive consistent routines and structures, clear and concise directions, positive reinforcement in the form of praise. A school-wide behavior program was recommended, with a points system. (P-11-1; R-4-1)

66. School D is a "therapeutic" day school with students who are emotionally disturbed, other health impaired, specific learning disability, intellectually disabled, learning disabled, high functioning autism. (Testimony of [redacted])

67. Students are aged 6-21 at School D. Classes start at 8:30am, and end at 2:50pm. (Testimony of [redacted])

68. School D runs a ten month program, with a July to August summer program. (Testimony of [redacted])

69. The Student has been accepted into the School D High School. (Testimony of [redacted])

70. The school contains a transition program, with on the job training. (Testimony of [redacted])

71. The Student would be in grade 10 were he to attend the school. (Testimony of [redacted])

72. Classes have 6 students in them, with two teachers and an aide. Teachers are certified in content areas and in special education areas. DCPS schools do not have such a staff to student ratio. (Testimony of [redacted])

73. The classroom aide acts as a behavioral counselor, redirecting negative behaviors of the students. (Testimony of [redacted])

74. The hallways have behavioral counselors, students are escorted wherever they go. The school has videotape and audiotape surveillance. (Testimony of [redacted])

75. There is an attendance team at the school. If a student misses school because of truancy, a staff meeting is held to get to the student to go to school. (Testimony of [redacted])

76. The cost of the program is $293 per day. (Testimony of [redacted])

77. The school includes English "ramp-up" classes that are dedicated to students with weaknesses in reading. These classes include a reading specialist and a speech and language pathologist who pushes into the class. (Testimony of [redacted])

78. In the class proposed for the Student, the ages range from 15-17. (Testimony of [redacted])

79. The Student would be assessed to determine if counseling would be appropriate for him. (Testimony of [redacted])

80. The School contains two social workers, two occupational therapists, two art therapists, seven school psychologists, five speech and language pathologists. DCPS schools with the same amount of students do not have such a large number of therapeutic staff members. (Testimony of [redacted])

81. Students are provided with individual counseling by psychologists, group therapy is provided by social workers. (Testimony of [redacted])

82. There are 76 students in the high school, about 60 percent have emotional issues. (Testimony of [redacted])

83. The school's behavioral program contains a "level" system. If the student behaves appropriately, the student travels from level to level and gains more benefits. There are five levels. For instance, in Level two, the student will be able to apply to participate in team sports. In Level three, the student will be able to participate in such activities as going to job training sites, going off campus. (Testimony of [redacted])

84. Students earn points sheets for every successful day at the school. A behavioral incident immediately "drops" them down a level. (Testimony of [redacted])

85. Classes at the school include government, history, English, math, science, music, physical education. (Testimony of [redacted])

86. The school includes vocational classes in culinary arts, engine repair, music production and engineering, child development, barbering and cosmetology, clothing and textiles. (Testimony of [redacted])

87. There is tutoring of students every Friday, for the last 50 minutes of the day. (Testimony of [redacted])

88. The Student would attend "ramp-up" English classes at the school. (Testimony of [redacted])

89. The Student would have difficulty focusing in a class of 15. (P-6-2)

90. Student needs social skills counseling, both individual and group. (Testimony of [redacted]; P-9-8)

91. The Student requires a small classroom environment where he can receive individualized attention. (P-9-6; Testimony of [redacted])

92. The Student would benefit from a highly structured and organized classroom environment, and works best academically in small group instruction. (P-4-3-4)

93. [redacted], Petitioner's witness in regard to the compensatory education plan, has appropriate credentials to make a judgment on an appropriate compensatory education plan for the Student. (P-20-1-3)

94. I found all of Petitioner's witnesses credible in this matter. All witnesses testified truthfully and directly answered the questions that were posed to them.

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).

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 C.F.R. Sect. 300.513(a).

1. General Education Program with 19.5 hours of Specialized Instruction.

Petitioner contends that the Student's program is inappropriate because the Student continues to be placed in a general education setting (with 19.5 hours of specialized instruction in the classroom) even though he has made no progress over the last few years. Petitioner contends that the Student requires needs additional support in a full-time special education setting to make academic and social-emotional progress. In particular, Petitioner contends that the Student needs a smaller classroom setting, less students in the classroom, more staff in the classroom, more individual attention to meet his special education needs.

Respondent's view is that it has increased the Student's special education hours from 15 to 19.5, and that such an increase makes the IEP reasonably calculated to provide educational benefit.

In reading, the Student is functioning on a very low academic level. Though sixteen years old and in tenth grade, the Student is reading on the kindergarten to first grade reading level according to his most recent IEP. The Student cannot spell many simple words. The Student has difficulty sounding out words and often mixes up basic consonant sounds and pairings. The Student struggles with multi-syllabic words. Decoding key vocabulary and identifying context clues is difficult for the Student. The Student experiences challenges when being asked to read out loud. The Student needs many prompts to read independently, even with a modified text.

In writing, the Student is also functioning at a very low level. The Student's writing samples are often incomplete due to a lack of understanding. He has trouble formulating simple responses to prompts. When writing, the Student has difficulty differentiating between singular and plural nouns and will often add extra letters to words. In math, too, the Student is

functioning at a very low level. He has difficulty computing independently and does not produce the correct answers automatically. He cannot perform three digit equations and cannot do division.

Given these these low functioning levels, the Student has had understandable difficulty understanding the material in his general education classes in high school. Though the Student has received special education services in some of his classrooms, these services have not worked to allow the Student to make any academic progress in this environment. As correctly pointed out by Petitioner, the Student's levels of performance have stayed exactly the same in the past few years. The "Present Level of Educational Performance" section of the January 19, 2012 in reading is identical to the "Present Levels of Educational Performance" section in the February 7, 2011 IEP. The goals in reading in the January 19, 2012 IEP are identical to the reading goals in the February 7, 2011 IEP. The "Present Level of Educational Performance " section of the January 19, 2012 IEP in math is identical to the "Present Level of Educational Performance" section in the February 7, 2012 IEP in math. The goals in math on the January 19, 2012 IEP are identical to the math goals in the February 7, 2011 IEP. The "Present Level of Educational Performance " section of the January 19, 2012 IEP in writing is identical to the "Present Level of Educational Performance" section in the February 7, 2012 IEP in writing. The goals in writing on the January 19, 2012 IEP are identical to the writing goals in the February 7, 2011 IEP.

In connection to this lack of progress, the Student has developed significant behavioral problems. The Student is excessively absent and has engaged in dishonesty, fighting, running in the hallways, sleeping in class. The Student considers school a stressful experience and

avoids going as much as he can. The Student also has significant attentional issues in the classroom.

DCPS contends that the addition of 4.5 hours of specialized instruction will result in a material change to the Student's performance and progress. This IHO cannot agree. There is nothing in the record to suggest that an addition of 4.5 hours will do much, if anything, to change the Student's performance or rate of progress. I will note that Respondent did not call any witnesses to rebut the persuasive testimony of the Petitioner, [redacted] and [redacted], all of whom suggested that removal from general education will allow the Student to receive greater individual attention, a smaller class size, more small group instruction, and work that is better tailored to his abilities.

Additionally, I agree with Petitioner that the DCPS program does not address the Student's social and emotional issues. The IEP does not provide any services to address the Student's social and emotional issues, and there are no social and emotional levels or goals on the IEP. The record reflects, and I find, that the Student requires greater attention in the school and in the classroom to address his social and emotional issues, which include truancy, absenteeism, fighting, sleeping in class, inattentiveness, walking around in the hallways.

It is noted that documentation in the record from DCPS indicates that the Student cannot function in a large classroom environment. A Data Evaluation Review by [redacted] (date April 4, 2011), a DCPS Psychologist, references a teacher, [redacted], who indicates this:

> The Student population in my class is around 30 students. [Student] would probably have difficulty focusing in a class half that size, so this contributes greatly to his inability to concentrate. He also has reading and reasoning difficulties which hinder his progress. (P-6-2)

In sum, the nature of the Student's severe learning disability -- with a kindergarten to first grade reading level -- and the Student's concomitant behavioral issues have resulted in no

progress in the general education environment during high school. This has occurred even with the special education services offered by the Respondent. A more significant change is required than Respondent's proposal to add 4.5 hours of special education services in the general education environment. Petitioner has shown that the Respondent denied the Student a FAPE through its IEP dated January 19, 2012.

2. Vocational Assessment/Post Secondary Goals.

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 C.F.R. 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 C.F.R. Sect. 300.320(b); see 20 U.S.C. Sect. 1414(d)(1)(A)(i)(VII).

Post-secondary activities in the IEP include attending a vocational school, seeking out an internship within the community. Post-Secondary goals in the IEP include identifying and exploring the requirements of 3-5 vocational schools, seeking out required internships. In the

IEP, the Student's course of study relating to his post-school goals includes classes in algebra, English, environmental science, world geography, advisory, and forensics. The Student is recommended for "advisory" as a transition services, 60 minutes per day.

The report of Petitioner's psychologist mentions the need for vocational training but does not address the IEP and not clearly support Petitioner in regard to this issue. The Compensatory Education Plan indicates that the Student's Post-Secondary Transition Plan is based on an assessment that is not comprehensive. However, [redacted], the author of the plan, did not discuss this issue at length in testimony. He also did not discuss why the assessment is not comprehensive or how this lack of comprehensiveness has had any impact on the Student. Petitioner's other documents also do not support the claim that the transition plan and the transition goals were unreasonably calculated. Petitioner bears the burden of persuasion in these proceedings. Petitioner has failed to show that Respondent denied the Student a FAPE in this connection.

3. Failure to Implement Claim.

In regard to the failure to implement claim, such 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 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007).

Here, the advocate, [redacted], provided hearsay testimony that the Principal of School C told a mentor who works with the family that the school could not provide the services

in the Student's IEP for the 2012-2013 school year. [redacted] also referenced an email from this Principal which in fact does indicate that the school could not provide the Student with the 19.5 hours of specialized education services that were on the IEP. After being alerted that the Student required such hours, the Principal's reaction was to state: "we need to meet to discuss appropriate placement for him." (P-17-4) Respondent did not present any witnesses to the contrary. This IHO found [redacted] to be credible throughout his testimony. The record reflects, and I find, that DCPS failed to provide the Student with 19.5 hours of specialized instruction during the 2012-2013 school year. I further find that this failure to provide services contributed to Student's poor academic performance during the 2012-2013 school year, which includes truancy, lateness, unauthorized presence in the halls, obscene behaviors, academic dishonesty, fighting, and failing grades. Respondent denied the Student a FAPE for 2012-2013 for the additional ground of failing to implement the Student's IEP for the 2012-2013 school year.

Parenthetically, Petitioner did not put on any witnesses or present any testimony to support claims that the Student's IEP was not implemented for 2011-2012. Accordingly, I do not find that Respondent failed to implement the Student's IEP for 2011-2012.

4. Remedy.

A. Non-Public School.

Petitioner asserts that appropriate relief in this matter is to order placement of the Student at School D, a non-public school in Virginia.

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.

Here, the Petitioner presented specific, persuasive testimony from School D indicated that the school could provide many new interventions that would be appropriate for this Student. School D is a "therapeutic" day school for students who have special education issues, including students who have emotional issues and students with a specific learning disability.
The staff to student ratio is very small at the school, which would allow the Student much greater access to support than he has been receiving. As opposed to a classroom with 30 students, these classes have classes have 6 students in them, with two teachers and an aide. Teachers are certified in content areas and in special education areas. In the class proposed for the Student, the ages range from 15-17. The school includes English "ramp-up" classes that are dedicated to students with weaknesses in reading, such as the Student. These classes include a reading specialist and a speech and language pathologist who pushes into the class. There is tutoring of students every Friday, for the last 50 minutes of the day.

To address behavioral issues, the classroom aide acts as a behavioral counselor, redirecting negative behaviors of the Students. The hallways have behavioral counselors,

students are escorted wherever they go. The school has videotape and audiotape surveillance. There is an attendance team at the school. If a student misses school because of truancy, a staff meeting is held to get to the student to go to school. The Student would be assessed to determine if counseling would be appropriate for him. Students are provided with individual counseling by psychologists, group therapy is provided by social workers. In all, the school contains two social workers, two occupational therapists, two art therapists, seven school psychologists, five speech and language pathologists.

The school's behavioral program contains a "level" system. If the Student behaves appropriately, the Student travels from level to level and gains more benefits. There are five levels. For instance, in Level two, the Student will be able to apply to participate in team sports. In Level three, the Student will be able to participate in such activities as going to job training sites, going off campus. Students earn points sheets for every successful day at the school. A behavioral incident immediately drops them down a level.

In its closing argument, DCPS focused on the fact that the school contains many students in the school have emotional issues. However, the record indicates that the Student also has significant emotional issues. The Student fights in school, curses in school, acts disrespectfully in school, walks the halls, has been absent, tardy, sleeps in class, has attentional issues. I find that the School D behavioral supports in the school are appropriate for this Student.

Applying the Branham factors, I find that the Student has severe, long-standing learning problems that have not been solved by the interventions of DCPS. The program at School D provides specific special education supports that have not been tried before for this Student, including very small class size, monitoring of the hallways, attendance teams, a significant

amount of behavioral support through professional staff. A points-based system with tangible, desirable rewards is established at School D. No issue has been raised with respect to cost.

A question here is whether School D is the least restrictive environment for the Student. 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). Still, it is appropriate for this IHO to assess whether this placement is the Student's LRE. Id., at 34-36 (affirming an HOD denying a tuition award on, inter alia, LRE grounds, notwithstanding a finding of FAPE denial)

On the facts here, I agree with Petitioner that the parental placement is appropriate for the Student. The record shows that the Student has not been making progress in general education notwithstanding special education supports in the classroom. The Student does not understand the work in general education classes, does not receive enough individualized attention in general education classes, cannot focus in his classes, and has become frustrated with school. The record further indicates that the lack of progress is related to the Student's recent behavioral issues, including truancy and fighting in school. The record shows that the proposed placement would address the Student's academic deficits, including through a "ramp-up" English class which would help him progress beyond the kindergarten to first grade reading level. The placement would provide smaller class size and additional behavioral supports to address the Student's absenteeism and truancy. Courts have held that it can be appropriate to order private placements for students with learning disabilities where the general education environment has not resulted in progress. Nein v. Greater Clark County Sch. Corp., 95 F. Supp.2d 961 (S.D. Ind. 2000); Evans v. Rhinebeck Cent. Sch. Dist., 930 F. Supp. 83 (S.D.N.Y. 1996).

Finally, DCPS did not call any witnesses to explain how it could provide a FAPE for the Student at one of its schools for the remainder of 2012-2013 school year. Under the

circumstances, this IHO finds that School D is an appropriately restrictive setting for this Student.[2] This IHO will therefore award tuition payment for the Student at School D for the remainder of the 2012-2013 school year.

B. Compensatory Education.

One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services...to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524. Some specifics regarding the type of relief sought may not be required if witnesses have identified where the Student's levels should be after FAPE denial, where the Student's levels are

[2] It is noted that once a public school district has failed to offer a FAPE, the IHO is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. Sect. 1415(i)(2)(C)(iii); Florence County Sch. Dist. 4 v. Carter, 510 U.S. 7, 16 (1993); N.S. ex rel. Stein v. Dist. of Columbia, 709 F. Supp. 2d 57, 73 (D.D.C. 2010).

after FAPE denial, the number of hours of compensatory education needed, and the program that is needed.. Cousins v. District of Columbia, 2012 WL 3090265 (D.D.C. 2012).

This IHO has found that Respondent denied the Student a FAPE since January 19, 2012. Petitioner presents the testimony of [redacted], a former teacher with a foreign degree in special education, in support of her compensatory education plan. Petitioner's plan requests 6 hours a week for 40 hours of 1-1 independent tutoring, 2 hours a week for 40 weeks of behavioral support services, and an independent vocational assessment.

In regard to the request for an independent vocational assessment, this IHO has not found Respondent's program and placement to be deficient on this basis. Additionally, [redacted] did not establish any particular credentials in this area, or make clear the type of assessment Petitioner is seeking, or how this relief can be deemed "compensatory" according to Reid. Accordingly, I must deny such request.

In regard to the request for independent behavior support services, [redacted] did not establish any credentials in regard to behavioral support services. Additionally, [redacted] did not indicate what sort of behavioral support services Petitioner is seeking or who would provide these services. [redacted] also did not indicate how such behavioral support services might make up for the FAPE denial since January 19, 2012. Further, [redacted] did not take into account the fact that School D will provide the Student with behavioral support services if it deems those necessary. It can be appropriate to take into account the school the Student will be attending at School D in this connection. Phillips v. District of Columbia, 736 F.Supp.2d 240 (D.D.C. 2010)(it is "entirely conceivable" that no compensatory education is required for a denial of a Free Appropriate Public Education because alleged deficiencies may have been mitigated or even totally alleviated by a school placement). Under the facts here, in regard to

behavioral support services, I am not persuaded that Petitioner has presented a compensatory education plan in accord with Reid. This IHO will deny Petitioner's claim for relief in this connection.

In regard to the tutoring request, [redacted] resume indicates that he is qualified to make an assessment about the Student's needs. He is an experienced educator who currently provides tutoring to students in DCPS schools. His plan describes the Student's academic levels prior to the time period in question. The plan also indicates that the Student has regressed since that time. The plan indicates the number of hours to be provided to the Student, indicates what services are to be provided to the Student to make up for the lost time. Cousins, 2012 WL 3090265 at *6. The plan suggests that 6 hours of tutoring for 40 weeks can amount to about one year's growth, which is a similar time period to the time period of FAPE denial herein. There is no testimony or evidence to rebut these findings in the record. This IHO finds the request for 6 hours a week (40 weeks) of 1-1 independent tutoring to be consistent with Reid and a reasonable reward for the Student's FAPE denial from January 19, 2012 to present. I will therefore order such relief, as provided by a certified special education teacher.[3]

[3] Petitioner did not argue for the additional remedy of a revision of the IEP in her opening statements and closing statements. Moreover, there is nothing in the record to suggest that such relief is necessary for the Student. In view of the relief ordered herein, I decline to order a revision of the IEP.

ORDER

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

1. Respondent is determined to have denied the Student a FAPE by its IEP meeting of January 19, 2012;

2. Respondent is determined to have failed to implement the Student's January 19, 2012 IEP for the 2012-2013 school year to date;

3. Respondent is directed to pay tuition for the Student at School D for the remainder of the 2012-2013 school year. Respondent may request proof of attendance prior to payment of such tuition;

4. Respondent is directed to provide the Student with 6 hours a week of individualized tutoring for 40 weeks by a special education teacher;

5. The District shall have 20 days from the issuance of this HOD to arrange for tutoring of the Student.

Dated: December 26, 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: December 26, 2012

Michael Lazan
Impartial Hearing Officer