

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

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

OSSE
Student Hearing Office
August 19, 2013

PARENTS, 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 _____ student who is a ward of the District of Columbia. He has been determined to be a child with a disability who needs special education and currently attends School A. Petitioners are the Student’s pre-adoptive foster parents (“Petitioners”). By Due Process Complaint filed on June 5, 2013, Petitioners allege that DCPS has violated the Individuals with Disabilities Education Act (“IDEA”), as amended, and denied Student a free appropriate public education (“FAPE”) in various respects.

Impartial Hearing Officer _____ was initially assigned to hear the case.

DCPS filed a timely Response to the Complaint which denies the allegations on or about June 11, 2013. A resolution meeting was not held in this matter. Petitioners waived resolution in their Complaint, and DCPS waived resolution in writing on _____. The HOD in this case was due on _____.

A Prehearing Conference (“PHC”) was held on July 3, 2013. Appearing were _____ for Respondent, _____, for Petitioners. A prehearing order was subsequently issued by Hearing Officer _____ July 8, 2013.

By motion filed on _____, Petitioners moved to preclude Respondent from offering the testimony of Teacher A. Petitioners contended that because Teacher A failed to provide consent for the Petitioner to access a document sent to School B (the “Teacher A Assessment”), she should be excluded from participation in the hearing. Petitioners also moved for summary judgment in this connection. Respondent submitted opposition papers

On July 19, 2013, this Impartial Hearing Officer was appointed to hear this matter after the recusal of Hearing Officer _____. On July 23, 2013, the parties conducted oral argument before this IHO on the motion, with _____, appearing for Petitioners and

_____ appearing for Respondent. On July 29, 2013, an order was issued directing DCPS to provide consent for the Teacher A Assessment, which is Exhibit P-39. The order also denied Petitioner’s motion for summary judgment because issues of fact remained in the case.

This was a closed proceeding. Petitioner was represented by _____. Respondent was represented by _____. Petitioner entered into evidence exhibits 1-39; Respondent entered into evidence exhibits 1-12. Petitioner presented as witnesses: Witness B, School B; Witness C, Social Worker; Petitioner A; Witness D, Clinical Director, School C; Witness E, Director of Education, School C; Witness F, Educational Advocate (expert, developing educational programs for students with disabilities). Respondent presented as witnesses: Teacher A, special education teacher; Witness G, speech and language pathologist; Witness H, DCPS administrator.

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, _____, and eligible for services as a student with multiple disabilities. The Complaint involves claims implicating 34 CFR 300.507(a) and 34 CFR Sect. 300.532. The Complaint indicates that DCPS failed to provide the Student with a 1:1 (or “dedicated”) aide as required by the IEP; failed to provide occupational therapy services to the Student in the 2012-2013 school year; failed to provide speech and language therapy services to the Student in the 2012-2013 school year; that the Student failed to make academic and therapeutic progress in the 2012-2013 school year; that the location of services, School A, was inappropriate for the Student for the 2012-2013 school year; that the DCPS program and placement for the 2013-2014 school year was inappropriate; that the Teacher A Assessment was not provided to the Petitioners.

ISSUES

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

1. Did DCPS deny the Student a FAPE by failing to provide an appropriate educational placement and/or location of services to meet his academic and emotional/behavior needs for the 2012-13 school year, in that School A allegedly could not implement his IEP requirement of a “therapeutic setting” and Student has not made academic progress there?

2. Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (i.e., one that was reasonably calculated to confer educational benefit) for the Student on or about [redacted] in that the IEP provided no speech and language therapy services?

3. Did DCPS violate the IDEA and/or deny the Student a FAPE by refusing to evaluate him using informal assessment tools, which would have addressed concerns that DCPS cited as invalidating the independent speech and language evaluation?

4. Did DCPS deny the Student a FAPE by materially failing to implement the requirements of his [redacted] IEP, by materially failing to implement the requirements of his [redacted] IEP, and by failing to timely provide occupational therapy services on a regular and consistent basis as required by his IEP from November, 2012 through to March, 2013?

5. Did DCPS violate the IDEA and/or deny the Student a FAPE by failing to release to Petitioners an assessment written by the Student's teacher and provided to a non-public school as part of its admissions process?

6. Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (i.e., one that was reasonably calculated to confer educational benefit) for the Student on or about May 23, 2013, in that the IEP a) provided no speech and language therapy services; b) eliminated the "therapeutic setting" requirement; c) eliminated the dedicated aide requirement as of June 20, 2013?

7. Did DCPS deny the Student a FAPE by removing the dedicated aide and "therapeutic setting" requirements without a) discussing the matters at the May 23, 2013 IEP

meeting, and b) providing Petitioners access to the teacher assessment described under issue 5 while relying on the input of such teacher?

Claims relating to the failure of Respondent to provide a dedicated aide were resolved by the parties at the start of the hearing. The parties agreed that the IEP should be construed to recommend a dedicated aide through to the expiration date of the IEP. As a result, this IHO will not consider claims relating to the failure of DCPS to discuss a dedicated aide at the IEP meeting, and claims relating to the failure of DCPS to include a dedicated aide on the IEP.

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 a ward of the District of Columbia. (Testimony of Petitioner A)
2. The Student lives with his foster parents, who are his pre-adoptive parents. They were appointed by a Court to be the Student's educational advocates. (Testimony of Petitioner A, P-7-1)
3. The Student was neglected early in life. His biological parents' parental rights were terminated by the courts, and the Student was placed with an uncle with mental health issues. (P-7-1)
4. The Student has been diagnosed with ADHD, Combined Type, Disruptive Behavior Disorder NOS, Post-traumatic Stress Disorder, Chronic by History. (P-7-5)
5. The Student has to struggle hard to complete tasks, makes mistakes during tasks, is excitable and impulsive, and has trouble paying attention to work or play. (P-21-1-2)

6. The Student has sensory difficulties including a dislike of loud noises, crowds. (P-7-2)
7. The Student is obsessed with death and has difficulty regulating his moods and behaviors. He has frequent temper tantrums. (Testimony of Petitioner A, P-7-2)
8. The Student's behavioral problems seriously affect his schoolwork and grades. (P-21-2)
9. The Student has significant difficulty with executive functioning. (P-9-11)
10. Transition between activities is a big problem for the Student. (Testimony of Petitioner A)
11. The Student has difficulty with tasks that are sensitive to attention. (P-9-8)
12. The Student gets very frustrated with his homework. (Testimony of Petitioner A)
13. The Student has severe test anxiety. (Testimony of Teacher A; P-9-4)
14. The Student's handwriting is illegible at times. (Testimony of Teacher A)
15. The Student struggles with reading comprehension. (Testimony of Teacher A)
16. The Student has more deficit areas in math than in reading. (Testimony of Teacher A)
17. The Student has been diagnosed with Expressive Language Disorder, Expressive Receptive Language Disorder. (P-9-12, P-7-5)
18. The Student has been diagnosed with Post-Traumatic Stress Disorder. (P-23-7)
19. The Student needs "in the moment" intervention. (Testimony of Witness B)
20. The Student requires a very small class size with small grouping for academic instruction. (P-9-12)

21. The Student requires intensive language stimulation through speech and language therapy and in the classroom. (P-9-12)

22. The Student requires an environment in which time, space, and expectations are highly structured. (P-9-13)

23. The Student requires 1:1 instruction and also requires technology in school. (P-39-3)

24. The Student requires a behavioral plan and a therapeutic setting consisting of an updated FBA and BIP, a daily behavior point sheet, a cool-down area, frequent verbal praise, academic tasks broken down with 1:1 assistance and frequent breaks, regular behavioral support inside and outside the classroom with a social worker and frequent communication between home and school. The Student also needs to continue with community based therapeutic services including regular medication management, therapeutic after school programming, and individual therapy to address the Student's post-traumatic stress disorder. (Testimony of Teacher A; P-23-7; P-28-1-8)

25. Once the Student begins to trust and feel comfortable with staff, he is a pleasant student. (P-39-3)

26. Outside of school, the Student sees a trauma therapist twice weekly, sees a psychiatrist monthly, and has monthly meetings with a social worker. (Testimony of Petitioner A)

27. The Student has made progress in the home environment and is now as stable as he has been since birth. (Testimony of Petitioner A)

28. In 2011-2012, the Student attended School D, a DCPS school. (Testimony of Petitioner A)

29. The Student was hospitalized twice in 2011 after the Student made suicidal statements. (P-7-3-4)

30. , a psychiatric assessment by Evaluator A of Institute A indicated that the Student did not have autism spectrum disorder. This assessment recommended a comprehensive language battery for the Student. (P-8-4)

31. , the Student's broad reading score was 88 on the Woodcock-Johnson III Tests of Achievement (20th percentile), and his broad writing score was 49 (below the first percentile). In Verbal Information Processing, the Student scored a 60 (below first percentile) in understanding directions and 69 (2nd percentile) in listening comprehension. His broad math score was 65 (1st percentile). (P-9-7-9)

32. , on the WISC-IV, the Student scored a 104 in the verbal comprehension index, an 86 in the perceptual reasoning index (18th percentile), a 74 in the working memory index (4th percentile), and a 78 in the processing speed index (7th percentile). (P-9-6)

33. A neuropsychological assessment in by Evaluator B indicated that the Student had weak scores in many areas of language functioning. Evaluator B diagnosed the Student with Expressive Language Disorder, indicated that Mixed Expressive/Receptive Language Disorder should be ruled out, and recommended "intensive language stimulation, both through the classroom program and individual speech/language therapy."

33. An IEP team met on in regard to the Student. The team recommended 22.5 hours of specialized instruction per week, with occupational therapy for 240 minutes per month and behavioral support services for 2 hours per month. A dedicated aide is recommended. (P-23-9-10)

34. This IEP recommends a therapeutic, self-contained setting that may include a daily behavior point sheet, a cool-down area, frequent verbal praise, academic tasks broken down with 1:1 assistance and frequent breaks, and regular behavioral support inside and outside the classroom with a social worker and frequent communication between home and school. The IEP indicates that the Student needs to continue with community based therapeutic services including regular medication management, therapeutic after school programming, and individual therapy to address the Student's post-traumatic stress disorder. (P-23-7)

35. In 2012-2013, the Student attended School A, a DCPS school, because the program at School D was transferred to School A. There are general education students in this school. (Testimony of Petitioner A; Testimony of Witness H)

36. A speech and language assessment was conducted of the Student by Evaluator C of Therapy Center A by report dated . The assessment noted behavioral problems including the Student kicking his feet and pounding his wrists. It indicated that the Student required alternative activities and breaks, though he did not want to take breaks. It noted that, after a few minutes, the Student did calm down. However, the Student quickly became frustrated as soon as the smallest demand was placed on him. (R-7-1-2)

37. Administration of the CELF-4 was attempted by Evaluator C. An overall score could not be obtained, though the Student scored in the severely delayed range in following multi-step directions. In recalling sentences, he scored in the moderately delayed range. His ability to formulate a sentence fell in the severely delayed range. Spontaneous language was judged to be below expectations for his age. (R-7-3-4)

38. A school observation by Evaluator C indicated that the Student was not talking in class, but seemed much calmer in class than he had seemed when seen one-on-one. (R-7-5)

39. As a result of the speech and language assessment, the Student was diagnosed with receptive language disorder. Speech and language therapy was recommended twice a week, for thirty minute sessions. Services in a group of two were suggested for the Student. Also recommended were gaining the Student's attention before delivering complex instructions, presenting information in precise and concise language, minimizing auditory distractions. (R-7-5)

40. Evaluator C indicated that the current classroom was appropriate for him and recommended that the Student continue in the placement. She indicated that the Student needed a dedicated aide but had a nice rapport with staff and looked to the classroom teacher for approval. (R-7-7)

41. At School A for 2012-2013, the Student started in a class led by Teacher B.

42. After a month to two months, the Student transferred from Teacher B's class to Teacher A's class because the school wanted him placed with more 4th graders. (Testimony of Petitioner A)

43. The Student was very upset when he left Teacher B's class and went to Teacher A's class. (Testimony of Petitioner A)

44. The Student was initially reluctant to speak once he was assigned to Teacher A's class. He also did not work on tasks at this time. (Testimony of Teacher A)

45. In Teacher A's class, staff included a behavior technician, an educational aide, and a dedicated aide. The dedicated aide would reinforce lessons for the Student. The behavior technician would address behavioral issues in class. There were six students in the class in October, 2012, and 10 students in June, 2013. (Testimony of Teacher A)

46. All accommodations in the IEP were implemented during the school year.
(Testimony of Teacher A; 23-7, 8)
47. Teacher A would consult with the school psychologist if there were issues with the student's behavior. (Testimony of Teacher A)
48. A points system was used for the Student to develop appropriate language, participation, completing assignments, and self-management. (Testimony of Teacher A)
49. Specific awards were provided to the Student in connection to the points system.
(Testimony of Teacher A)
50. The Student would take breaks during class if he needed a break. (Testimony of Teacher A)
51. During the Student's first semester in 2012-2013, the Student's behavior was very challenging. Petitioners were called repeatedly, the Student destroyed property in the school library, and the Student left the classroom and wandered the halls. Petitioners had to pick the Student up at least four times. (Testimony of Petitioner A)
52. An observation conducted _____ revealed that the Student had significant behavioral issues, including rocking in his seat, throwing books on the floor, crumpling paper, refusing to participate, name calling, wandering through the halls, sitting under a desk. (R-10-1-4)
53. During an observation of the Student _____, the Student was engaged, volunteered, had no behavioral concerns, he received tangible rewards. (Testimony of Witness H)

54. During an observation of the Student _____, the Student was not engaged in the discussion, had difficulty remaining in his seat, did not adhere to classroom rules, and used an infantile voice. (Testimony of Witness G)

55. A later observation by the same individual demonstrated that the Student's inappropriate behaviors had continued. (Testimony of Witness G)

56. The Student had behavioral outbursts during the second semester of school as well. The student had three or so "meltdowns" during this time. (Testimony of Petitioner A)

57. Most of the incidents pertaining to the Student were related to the introduction of new concepts. (Testimony of Teacher A)

58. An FBA for the Student was written as a result of observations _____. It describes the Student as moody, being out of his seat, with verbal aggression, talking out, withdrawing. It indicates that the behaviors take place more often in the morning or during math instruction. It indicates that the behavior increases with the amount of adult or student engagement. It indicates that the behavior allows him to avoid his assignments. It indicates that the Student's behavior improved when he was transferred to Ms. Webster's class. It indicates that the Student is the "top point earner" and responds well to the daily expectation system that has been established in the classroom and has responded well to options given when he is upset. (P-28-1-4)

59. Petitioners sought speech and language therapy for the Student in or about _____. (Testimony of Petitioner A)

60. Witness G of DCPS denied Petitioners' request for speech and language therapy since Evaluator C's testing of the Student was not complete. Witness G instead recommended instructional accommodations including prompt responses to "wh" questions, additional wait

time for oral responses, additional time for note taking, visual aids to explain and model key points, presenting information orally and visually, emphasizing key points of directions and/or instruction, and teaching coping strategies. (R-8-6-7)

61. A meeting was held in . Witness G and Petitioner A appeared at this meeting. At this meeting, Respondent took the position that the Student did not require speech and language therapy. (P-30-10; Testimony of Petitioner A; Testimony of Witness G)

62. Respondent did not retest the Student after the meeting in (Testimony of Petitioner A)

63. Petitioners and a social worker tried to arrange for additional speech and language testing for the Student, but were not able to do so. (Testimony of Witness C)

64. DCPS should have conducted its own testing of the Student once it determined that the independent assessment was invalid. (Witness G)

65. DCPS will use informal measurements to determine speech and language issues if needed for students. (P-22-11)

66. In or about , staff from DCPS went to the Student's home and asked him to sign a "safety contract" to hold him responsible for actions at the school. (Testimony of Petitioner A)

67. The Student was restrained 2 to 4 times during the school year. (Testimony of Teacher A; Testimony of Petitioner A)

68. Teacher A would sometimes call Petitioners to get the Student to talk in class. This practice ended after a BIP was created – and after Petitioners expressed that they was not comfortable with this practice. (Testimony of Teacher A)

69. The Student's BIP recommends establishing and reviewing academic and behavioral expectations at the beginning of the instructional day; verbal redirection and praise; referencing a "safety plan;" providing a daily schedule; using a timer to be used as a cue for self-managing task completion; "safe choices" to self-manage disruptive behaviors. Consequences of misbehavior relate to computer and library times, points earned. (P-28-7-8)

70. There were no major disciplinary incidents regarding the Student after _____, _____ . (Testimony of Petitioner A)

71. Still, the Student had difficulties managing his behavior during the latter portion of the 2012-2013 school year. The Student had particular difficulty with instruction that he felt was too difficult. (P-39-1)

72. Occupational therapy was not provided to the Student at one point during the school year. Later, Petitioners were told that there was a new occupational therapist at the school. The Student missed about two months of occupational therapy in total. (Testimony of Petitioner A)

73. The Student was offered make-up occupational therapy as a result of the gap in services. This occupational therapy was offered during spring break. (P-16-1)

74. An IEP team met for the Student on _____. The IEP dated _____ recommended 24.5 hours of specialized instruction outside general education, with occupational therapy 120 minutes per month and behavioral support services 2 hours per month. A dedicated aide was recommended for the Student. (P-13-13)

75. The IEP indicates, in regard to the Student's Emotional, Social and Behavioral Development, that the Student exhibits behavioral and academic challenges in the school setting. The IEP notes poor interpersonal skills, off task behaviors, impulsivity. It indicates that the

Student is quiet and will refuse to attend counseling, has difficulty when not given a choice, and becomes easily annoyed and frustrated. It recommends a small class size, close monitoring and continuous prompting, with redirection during assignments. Goals in this area relate to improving impulse control, expressing feelings, and increasing social interactions with peers and adults. (P-13-11)

76. Classroom accommodations in the IEP include repetition of directions, simplification of directions, interpretation of directions, reading of test questions, translation of words and phrases in math, science and composition, calculator use, dictated responses to an examiner, preferential seating, tests administered over several days, small group setting, location with minimal distractions, flexible scheduling, extended time during a subtests, and breaks during a subtest. (P-13-15)

77. In writing this IEP, Respondent did not use certain language that was included in the prior IEP from . In particular, the language relating to the Student's need for a therapeutic setting was taken off this IEP. At the IEP meeting, DCPS provided no basis for deleting the language relating to a therapeutic setting from the IEP. The parents objected to this deletion. (Testimony of Petitioner A)

78. By the end of the school year, the Student wanted to initiate with other students, had made friends in class. The Student would still become frustrated but the frustration was more controlled. (Testimony of Teacher A)

79. By the end of the year, the number of incidents regarding the Student had decreased. (Testimony of Teacher A)

80. The Student's progress was attributed to structure, bonding with staff, routine. (Testimony of Teacher A)

81. The Student showed progress in attending more counseling sessions by the end of the school year but demonstrated some behavioral difficulties when he did not get what he wanted. He stopped running away from the counselor and showed improvement in impulse control. (R-5-2-3)

82. During the 2012-2013 school year, there was improvement in the Student's math and reading skills. (Testimony of Petitioner A)

83. In math, at the beginning of the year, the Student was performing one digit by one digit addition without regrouping, and had minimal knowledge of geometry. (Testimony of Teacher A)

84. At the end of the year, the Student could add multi-digit with regrouping and perform multi-digit subtraction with regrouping with improved knowledge of geometry. The Student was also adding fractions with different denominators. The Student also progressed in identifying the least common denominator of two fractions. (R-5-4; Testimony of Teacher A)

85. The Student progressed in reading during the school year. The Student started the 2012-2013 school year at Level T and ended the year at Level W in the DIBELS assessment. His accuracy increased in reading and he had improved "retell" in regard to reading comprehension. He could better answer questions that were connected to a story. (R-5-5; Testimony of Teacher A)

87. During this time, the Student progressed in identifying the theme of a text and in spelling. Progress was noted in the Student's identification of the main point and supporting details of the text. There was also progress in answering "wh" questions, identifying the main idea of text, identifying characters and character traits, and identifying the number of syllables in a word. (R-1-2-3; R-2-3; R-3-2-3; R-4-2; R-5-5; Testimony of Teacher A)

86. The Student progressed in writing during the school year. The Student progressed in terms of the Student writing legibly when writing in cursive, writing paragraphs based on a question. Progress was noted in terms of sustaining focus while writing. (R-1-3; R-3-4; R-4-4)

87. The Student also progressed in occupational therapy by increasing visual motor integration, visual perceptual skills and bilateral skills. The Student mastered a goal in occupational therapy relating to improved visual perceptual skills. (R-2-6, R-4-7; P-26-24)

88. The Student's experience in occupational therapy included missed sessions and sessions when the Student was distracted and need to be redirected. On some occasions, the Student would grunt and cry. On some occasions, the Student participated. The Student's performance improved during the latter part of the school year, when the Student sometimes received sensory breaks and sensory preparatory activity. (R-6-1-10)

89. The Student's focus on tasks increased during the school year. (Testimony of Teacher A)

90. At the end of the year, the Student performed better during whole group instruction and completed more individual work. (Testimony of Teacher A)

91. The Student's confidence improved by end of the school year. (Testimony of Teacher A)

92. The Student became more tolerant of corrections by the end of the school year. (Testimony of Teacher A)

93. The Student needed less breaks to learn new concepts by the end of the school year. (Testimony of Teacher A)

94. Toward the end of the school year, there were behavioral incidents, but no incidents involving physical destruction. (Testimony of Teacher A)

95. The Student's fourth grade report card reflects that, by the fourth marking period, the Student was approaching standards in English Language Arts, Mathematics, Science, Social Studies. Only one subcategory was scored as S (for "secure"). Other subcategories were scored as "developing" or "beginning." The Student was reading "Just Right" books such as Roald Dahl's *Charlie and the Chocolate Factory* at the end of the school year. (R-9-1-2)

96. The Student's math PIA scores for 2012-2013 were as follows: September, 2012, 16 percentile, October, 2012, 27 percentile; December, 2012, 13 percentile; February, 2013, 19 percentile. (P-13-4)

97. The Student's reading PIA scores for 2013-2013 were as follows: September, 2012, 47 percentile; October, 2012, 30 percentile; December, 2012, 32 percentile; February, 2013, 23 percentile. (P-13-7)

98. The Student's PIA performance does not reflect his performance in the classroom. (Testimony of Teacher A)

99. The Student rushed through the PIA tests and did not pay close attention to the questions and problems therein. (Testimony of Teacher A)

100. Toward the end of the 2012-2013 school year, Petitioners applied on behalf of the Student to the School B for the 2013-2014 school year. (Testimony of Witness B)

101. School B is a specialized school for children with social and academic challenges. (Testimony of Witness B)

102. School B felt that it could not meet the Student's academic and social needs when Petitioners applied for the school. The school had reviewed the Teacher A Assessment prior to rejecting the Student. (Testimony of Witness B)

103. “In the moment” intervention is not available at the School B. (Testimony of Witness B)

104. The Student was accepted by School C for the 2013-2014 school year. (Testimony of Witness E)

105. School C offers a class with seven students, maximum of ten, with a teacher, an assistant, and three dedicated aides. (Testimony of Witness E)

106. School C offers a mental health therapist, a speech and language pathologist, and an occupational therapist for students. (Testimony of Witness E)

107. The school follows the Maryland state curriculum. (Testimony of Witness E)

108. Many children in the school are 1-2 years behind academically. (Testimony of Witness E)

109. All staff in the school are trained in how to address behaviors and how to manage behaviors. (Testimony of Witness E)

110. Staff use sensory techniques to de-escalate behaviors, such as taking students to an activity room, use of weighted vests, use of weighted blankets, and use of headphones. (Testimony of Witness E)

111. A behavior specialist provides training to staff during orientation and during professional development sessions. (Testimony of Witness E)

112. Staff are trained in deep pressure techniques. (Testimony of Witness E)

113. Teachers are special education certified at the school. (Testimony of Witness E)

114. The school uses attachment theory, which focuses on identifying cues and triggers to behaviors. The school will create an intensive behavioral plan based on the cues and triggers. (Testimony of Witness D)

115. The school uses trauma training, which leads them to understand the relationship between past trauma and a student's current behaviors. (Testimony of Witness D)

116. I found all the witnesses in this proceeding credible with the exception of Witness F, who I found partly credible. Witness F's conclusions about the Student's behavioral needs did not take into account some important materials that were before her, in particular the Student's FBA and BIP. I found the Student's teacher, Teacher A, to be a particularly credible and forthright witness in this matter.

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; Shaffer 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). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services

which are individually designed to provide educational benefit to the handicapped child.” Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes “no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children.” Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

1. Failure to Provide Appropriate Location of Services, 2012-2013.

Petitioners allege that Respondent’s location of services, School A, did not provide a therapeutic setting during 2012-2013 as per the IEP. Petitioners also allege that Respondent failed to provide the Student with regular occupational therapy services during 2012-2013 per the IEP. Petitioners also allege that the educational services provided by School A did not result in the Student’s educational progress.

“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).

Petitioner's argument is in part premised on the notion that there is a standard meaning to the word therapeutic in the special education context. However, the word therapeutic is not defined in the IDEA, in the accompanying regulations, in the DCMR, or even in the common parlance. To this IHO, a "therapeutic" setting could suggest a number of different programs and placements both in the non-public school context and the public school context.

Here, the Student was recommended for a therapeutic setting through the IEP. After the use of the word therapeutic at page 7 of this IEP, there are a number of specific requirements suggested by the IEP that in effect define a therapeutic setting in this context. A fair reading of this IEP indicates that, to this IEP team, a therapeutic, self-contained setting could mean that the Student receives a daily behavior point sheet, a cool-down area, frequent verbal praise, academic tasks broken down with 1:1 assistance and frequent breaks, regular behavioral support inside and outside the classroom with a social worker, and frequent communication between home and school.

The bulk of these services were provided by School A. A points system was employed by Teacher A during the school year that worked well for the Student, who was at one point the top "point earner" in his class. The Student was provided with frequent breaks, 1:1 assistance with his dedicated aide, and verbal praise as per the BIP. There was regular behavioral support in the classroom, which contained a behavior technician. The Student received counseling outside the classroom. There was frequent communication between the parents and the school, as evidenced by the emails in the record.

Moreover, there is credible evidence and testimony that the Student progressed in all major subject matter areas during his year at School A. Teacher A testified that, after a rough start, the Student improved in all academic areas including math, reading, and writing. She also

indicated that the Student made behavioral progress during the year. The IEP progress reports are consistent with this testimony. Petitioner A also testified that the Student made progress during the 2012-2013 school year, in math and reading.

It is noted that Evaluator C indicated that the School A was appropriate for the Student and recommended that the Student continue in the placement. She indicated that the Student needed a dedicated aide but had a nice rapport with staff and looked to the classroom teacher for approval.

It is also noted that there were no major behavioral incidents by the Student after February, 2013. While the Student was involved in some troubling behavioral incidents throughout the first part of the school year, these incidents can be attributed to the Student's difficulty with transitions, as explained by Teacher A.

Petitioners contend that the PIA testing scores indicate that the Student did not progress during the school year. However, Teacher A testified that the PIA testing was not an appropriate measure for this Student. Teacher A also testified that the Student rushed through the tests and did not pay attention to the questions during the testing. Petitioner did not present a witness to establish that the PIA testing was an authoritative measure for this Student.

Petitioners also contend that the IEP requirements were not met because the Student did not receive his counseling services. Additionally, Petitioner contends that the Student missed approximately two months of occupational therapy during the school year. However, the fact that related services were not provided to the exact letter of the IEP does not result in an automatic finding of FAPE denial. Savoy, 844 F. Supp.2d at 33-34. Petitioners have not supported these claims with any testimony or evidence explaining the impact of the missed counseling services and occupational therapy services. Instead, the record reflects that the

Student made progress in behavioral and emotional issues and in occupational therapy notwithstanding the missed sessions.

As a result, I find Petitioners' contentions regarding location of services for 2012-2013 are without merit.

2. Request for Speech and Language Therapy in

Petitioner alleges that the Student was improperly denied speech and language therapy after DCPS was presented with an independent assessment recommending such therapy in

. Petitioner also alleges that DCPS failed to informally assess after rejecting the independent assessment.

There is no "formula" to determine whether a student should receive speech and language therapy under the IDEA and its regulations. Whether a speech and language impairment adversely affects a child's educational performance must be determined on a case-by-case basis, depending on the unique needs of a particular child. Letter to Clarke, 48 IDELR 77 (OSEP Letter 2007). Courts have held that speech therapy can include areas that relate to behavioral issues. B.H. ex rel B.B. v. West Clermont Bd. Of Educ., 788 F. Supp.2d 682 (S.D. Ohio 2011)(Student with selective mutism required speech therapy to work on adaptive behavior and self-help skills; District failed to consider evaluations recommending speech therapy and denied FAPE).

Here, there was a fair amount of evidence before Respondent that this Student required speech and language therapy in . The Student had recently been diagnosed by professionals with both Expressive Language Disorder and Receptive Expressive Language Disorder. A neuropsychological assessment in by Evaluator B indicated that the Student had weak scores in many areas of language functioning. Evaluator B diagnosed the

Student with Expressive Language Disorder, indicated that Mixed Expressive/Receptive Language Disorder should be ruled out, and recommended “intensive language stimulation, both through the classroom program and individual speech/language therapy.” This assessment is well-written and credible to this IHO.

The assessment of Evaluator C, while not complete in regard to CELF testing, is similarly well-written and credible to this IHO. Evaluator C diagnosed the Student with Receptive Language Disorder and recommended speech and language therapy twice a week. Evaluator C indicated that the Student’s ability to recall sentences was moderately delayed, his ability to formulate sentences and follow multi-step directions was severely delayed, and his spontaneous language was quite limited.

Still, Witness G of DCPS rejected the parents’ request for speech and language therapy, even though she herself in her observation had noted that the Student used “infantile” language. Witness G took the position that all testing must be complete for the Student to receive speech and language therapy. However, as noted by Teacher A, this Student’s behavioral difficulties make testing very difficult.

Respondent also did not endeavor to conduct its own assessments on the Student after denying Petitioners’ request for services. This is so even though Witness G testified that informal assessments of speech can be considered if a Student is untestable. Nor did Witness G seek to reevaluate the Student to determine whether he needed speech and language therapy in view of the new information provided to it. 34 CFR Sect. 300.303(a)(1); Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 71 Fed. Reg. 46641 (August 14, 2006). Nor did Respondent call for an IEP meeting in view of the new information that was presented to it. 34 CFR Sect. 300.324(b)(1)(ii)(C).

Respondent also did not provide Petitioners with Prior Written Notice when Witness G denied Petitioners' request for speech and language therapy for the Student. A school district is required to provide such notice if the District refuses to change the placement or the provision of FAPE to a child. 34 CFR Sect. 300.503(a)(2). The purpose of the Prior Written Notice is to provide the parents with an explanation of, inter alia, why the agency refused the action, a description of the assessments, evaluation procedures and reports used by the agency in this connection, a statement relating to procedural safeguards, a description of other options considered by the District, sources for the parent to contact other assistance.

To this IHO, the record before Respondent in _____ contained sufficient information for speech and language services to be added to the IEP twice a week for thirty minute sessions. There are two well written professional reports that recommend such speech therapy. Evaluator C's assessment particularly identifies areas that the Student was deficient in, including a severe deficit in the ability to formulate sentences and in following multi-step directions. There is also a report from Evaluator A, a psychiatrist, indicating that the Student has difficulty with higher order processes pertaining to language. Finally, the Student's teacher, Teacher A, indicated that a points system was set up in part to address the Student's language issues. The District denied the Student educational benefit when it refused to provide the Student with speech and language therapy in _____. As a result, the District denied the Student's right to a FAPE.

3. Failure to Release Teacher Assessment.

Petitioners contend that DCPS violated the IDEA and/or denied the Student a FAPE by failing to release the Teacher A Assessment that was sent to School B at the end of the 2012-2013 school year.

The IDEA requires Districts to allow parents to inspect and review any educational records relating to their children that are collected, maintained, or used by the agency. 34 CFR 300.613(a). However, there is nothing in this record to suggest that Respondents collected, maintained, or used the document in question. Additionally, I have already ordered that Teacher A sign a consent for the release of this document by School B. This document is now in the possession of Petitioners, who were able to use this document to attempt to prove the contentions in the Due Process Complaint. Accordingly, this issue should be deemed moot. United States Parole Comm. v. Geraghty, 445 U.S. 388, 395 (1980)(if events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot); see also McBryde v. Committee to Review Circuit Counsel Conduct and Disability Orders of the Judicial Conference of the U.S., 264 F.3d 52, 55 (D.C. Cir. 2001); LeSesne ex rel. B.F. v. District of Columbia, 2005 WL 3276295, (D.D.C. 2005), aff'd LeSesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 832-833 (D.C. Cir. 2006)

It is noted that there is no reason to believe this issue is capable of repetition or avoiding review. Theodore ex rel. A.G. v. District of Columbia, 655 F. Supp.2d 136, 144-145 (D.D.C. 2009)(IDEA action; issue involved Student's initial eligibility for special education, which was not likely to recur; claim found moot).

Given the above, I find that Petitioners' contentions regarding the Teacher A Assessment is without merit.

4. Failure to Develop Appropriate IEP, May 2013.

Petitioners allege that the IEP meeting was conducted without a full discussion of a therapeutic setting for the Student. Petitioners also contend that the IEP meeting was conducted without providing the Petitioners access to the Teacher A Assessment.

Petitioners also allege that the IEP denied the Student a FAPE because it provided no speech and language therapy for the Student and eliminated the “therapeutic setting” requirement of the prior IEP in _____.

Congress sought to protect individual children by providing for parental involvement in the formulation of a child's individual educational program. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982). Accordingly, the regulations require that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the educational placement of the child. 34 C.F.R. § 300.501(b)(1); 20 U.S.C. § 1414(e). To this end, Districts have a duty to insure that parents meaningfully participate in an IEP review. Paolella ex rel. Paolella v. Dist. of Columbia, 210 F. App'x 1, 3 (D.C. Cir. 2006); A.M. v. Dist. of Columbia, 2013 WL 1248999 (D.D.C. Mar. 28, 2013); T.T. v. Dist. of Columbia, 2007 WL 2111032 (D.D.C. July 23, 2007).

Petitioners provide no support for the notion that they had no opportunity to express their opinions at the IEP meeting. On the contrary, the record suggests that Petitioners had a full opportunity to discuss issues relating to a therapeutic setting at the IEP meeting and did so. Petitioners then sent a letter to Respondent, on _____, explaining why they disagreed with the conclusions of the IEP team on _____. Nowhere in this letter do Petitioners state or suggest that they did not have a full opportunity to participate in the IEP meeting.

Petitioners also contend that they were not allowed an opportunity to discuss the Teacher A Assessment. However, Petitioners do not elaborate on how the Teacher A Assessment would have changed the discussion at the IEP meeting. A review of the Teacher A Assessment indicates that many of the issues referred to in the document were discussed at the IEP meeting and are incorporated in the IEP.

In regard to Petitioner's claims relating to the inadequacy of the IEP, this IHO must determine whether the individualized program developed is reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 177.

As previously stated herein, much evidence was available to Respondent in regard to speech and language therapy at the time of the review. The Student had been diagnosed by professionals with both Expressive Language Disorder and Receptive Expressive Language Disorder. A neuropsychological assessment had indicated that the Student had weak scores in many areas of language functioning and recommended "intensive language stimulation, both through the classroom program and individual speech/language therapy." The assessment of Evaluator C indicated that the Student's ability to formulate sentences was severely delayed, his ability to follow multi-step directions was severely delayed, and his spontaneous language was quite limited. Moreover, there is testimony here from Teacher A to the effect that the Student would refuse to speak in class when he was upset. I find that the Student's IEP written on should have included speech and language therapy, twice weekly, for thirty minutes.

Petitioners also contend that the Student continued to need a therapeutic setting for 2013-2014. This IHO has already indicated that the word "therapeutic" in this context refers to the interventions listed in the IEP. These interventions include a daily behavior point sheet, a cool-down area, frequent verbal praise, academic tasks broken down with 1:1 assistance and frequent breaks, regular behavioral support inside and outside the classroom with a social worker, and frequent communication between home and school.

The Student's behavioral issues had improved by the end of the 2012-2013 school year. Still, as Teacher A noted in the Teacher A Assessment, the Student continues to have

“difficulties managing his behavior especially during instruction that he determines is difficult for him.” Accordingly, the interventions that resulted in behavioral progress during the 2012-2013 school year should continue going into the 2013-2014 school year. Teacher A and the Student’s FBA indicate that a daily behavior point sheet is necessary for the Student. The record also indicates that the Student continues to require breaks to “cool down” during instruction, though his need for breaks lessened during the course of the 2012-2013 school year. The Teacher A Assessment specifically indicates that the Student requires 1:1 instruction. The record here suggests that the Student benefits from regular behavioral support inside and outside the classroom. Additionally, frequent communication between home and school are important here to make sure Petitioners are aware of any behavioral issues that may take place in school.

It is noted that Teacher A was asked about the Student’s need for therapeutic interventions by this IHO during the hearing. This IHO referenced the IEP, which did not include specific therapeutic interventions. Ms. Webster replied to the effect that she did not write the IEP, signaling that the interventions listed in the July, 2012 IEP must continue throughout the 2013-2014 school year.

In this connection, it is noted that there is no BIP incorporated into the IEP, as is required in the District of Columbia. 5-E DCMR 3007.3. Moreover, the record does not establish that the BIP would still be in effect for 2013-2014. Even if it were in effect, the BIP does not provide for breaks during instruction, a daily behavior point sheet, 1:1 instruction, regular behavioral support inside the classroom, or frequent communication between home and school.

For the foregoing reasons, I find that the District denied the Student a FAPE by offering the parents the IEP without appropriate therapeutic interventions and without appropriate speech and language therapy.

4. Remedy.

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

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.

In this case, there is testimony and evidence that the Student should stay in public school with an amended IEP adding speech and language therapy and restoring the therapeutic interventions from the IEP. Teacher A convincingly testified that the Student made a significant amount of progress in academic areas and in social emotional areas during the 2012-2013 year. Teacher A testified in detail about the Student’s progress in reading, math, and social emotional issues. Teacher A’s testimony is consistent with the Student’s progress reports,

which indicate in detail that the Student made gains on his academic and social/emotional goals during the 2012-2013 school year.

Moreover, the record establishes that the Student is averse to transitions. The Student had difficulty when he was transferred from Teacher B to Teacher A during the 2012-2013 school year. Moving to School C would cause the Student to have to overcome a transition period that is unnecessary in view of the progress that the Student made at School A during the 2012-2013 school year.

Finally, the record establishes that the Student would receive exposure to typically developing peers in the public school environment. In School C, the student would have no access to typically developing peers. Jennifer D. v. New York City Dep't of Educ., 550 F. Supp.2d 420 (S.D.N.Y. 2008) (where District's self-contained placement included no access to typically developing peers, and where parents' self-contained placement did include access to typically developing peers, District deemed to deny FAPE and reimbursement ordered).

In sum, while this IHO was generally impressed with School C, and while School C meets many of the Student's academic and behavioral and emotional needs, I decline to order that the Student attend School C for 2013-2014.

Petitioner also seeks compensatory education for the missed speech and language therapy in 2012-2013.

One of the equitable remedies available to a hearing officer 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.

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.

Petitioners contend that 60 hours of speech and language therapy is an appropriate remedy for the deprivation herein. While Petitioner could have presented more testimony and evidence in this connection, the record suggests that 60 hours of additional speech and language therapy would provide the Student with the "intensive language stimulation" that was recommended by Evaluator B in connection to the Student's speech and language therapy. Moreover, to this IHO, the request for 60 hours of speech and language therapy is reasonable in view of the fact that the Student missed speech and language therapy

. If the District had properly adopted the recommendation of Evaluators B and C, the Student would have received well over 100 hours speech and language therapy during the 2012-2013 school year. Accordingly, I will order the District to provide the Student with 60 hours of compensatory education in the form of speech and language therapy.

ORDER

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

1. Respondent is adjudged to have denied the Student a FAPE by: a) failing to provide speech and language therapy after being requested to do so by the parents in November, 2012; b) failing to create an appropriate IEP ;

2. Respondent is directed to amend the IEP to add language requiring a therapeutic, self-contained setting including a daily behavior point sheet, a cool-down area, frequent verbal praise, academic tasks broken down with 1:1 assistance and frequent breaks, and regular behavioral support inside and outside the classroom with a social worker and frequent communication between home and school. The IEP should also indicate that the Student needs to continue with community based therapeutic services including regular medication management, therapeutic after school programming, and individual therapy to address the Student's post-traumatic stress disorder;

3. Respondent is directed to amend the IEP to add language requiring that the Student receive speech and language therapy twice a week in a group of two for thirty minute sessions;

3. Respondent is ordered to provide the Student with 60 hours of speech and language therapy. Such therapy should be completed by the end of the 2013-2014 school year;

4. Petitioners' other claims are hereby denied with prejudice.

Dated: August 17, 2013

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: August 17, 2013

Michael Lazan
Impartial Hearing Officer