

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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| Parent, on behalf of Student,¹ |) | Room: 2006 |
| Petitioner, |) | Hearing: March 21, 2016 |
| |) | HOD Due: April 11, 2016 |
| v. |) | Hearing Officer: Michael Lazan |
| |) | Case No.: 2016-0031 |
| School B PCS, |) | |
| |) | |
| Respondent. |) | |

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X year old student who is eligible for services as a Student with a Specific Learning Disability. (the “Student”)

A Due Process Complaint (“Complaint”) was received by Respondent School B PCS (“Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on February 23, 2016 in regard to the Student. The Complaint had been filed with the Office of Dispute Resolution on February 17, 2016.

On February 29, 2016, Respondent filed a response. A resolution meeting was held on March 7, 2016. The resolution period ended, *in this expedited matter*, on March 1, 2016. The HOD is due on April 11, 2016, which is ten school days after the date of the hearing allowing for a spring break period per the applicable regulation. 34 CFR Sect. 300.532(c).

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

II. Subject Matter 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.

III. Procedural History

On March 8, 2016, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order issued on March 11, 2016, summarizing the rules to be applied in this hearing and identifying the issues in the case.

There was one hearing date in this case, on March 21, 2016. This date is within twenty school days of the service of the Complaint on Respondent, consistent with the applicable regulation. 34 CFR Sect. 300.532(c). This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved in Exhibits 1-57. There were no objections. Exhibits 1-57 were admitted. Respondent moved into evidence Exhibits 1-26. There were objections made to Exhibits 6 and 11 on relevance grounds, which were overruled. Exhibits 1-26 were admitted.

The parties presented oral closing statements at the close of testimony on March 21, 2016.

Petitioner presented as witnesses: Witness A, Educational Advocate (Expert: review of special education evaluations); Witness B, Educational Advocate; Witness C, a

psychologist (Expert: school psychology and counseling); the mother; and the father. Respondent presented as witnesses: Witness D, School Registrar; Witness E. School Director; and Witness F, Special Education Coordinator.

IV. Credibility.

I found the witnesses in this case to be credible. No material inconsistencies were found with respect to any witness except with respect to the issue of whether the parents presented School B PCS with a copy of the Student's IEP during the enrollment process at the school. On this issue, Witness D testified that no such IEP was presented, whereas the parents both testified that the IEP was in fact presented. Since the testimony is in equipoise on this issue, and there is no corroborating evidence, I have found that Petitioner has not established that she produced a copy of the IEP to the school during the enrollment process.

V. Issues

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

1. Did Respondent fail to render a correct manifestation determination after the Student's suspension from school on or about December 8, 2015? If so, did Respondent violate 34 CFR Sect. 300.530(e)? If so, did Respondent deny the Student a FAPE? (expedited claim)

2. Did Respondent fail to provide the Student with an appropriate IEP on 12/15/15? If so, did Respondent violate 34 CFR Sect. 300.320 and act in contravention of some of the principles in such cases as Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Petitioner contends that the Student requires a “stand alone” therapeutic setting with crisis management services and related services.

3. Did Respondent fail to provide the Student with an appropriate placement after his suspension from school? If so, did Respondent fail to return the Student to his former placement or fail to provide an IAES pursuant to 34 CFR. Sect. 300.532(b)(2)? If so, did Respondent deny the Student a FAPE? (expedited claim)

4. Did Respondent fail to implement the Student’s IEP dated December, 2014, which IEP was in effect prior to the suspension during the 2015-2016 school year? If so, did Respondent violate 34 CFR Sect. 300.350 and precedent such as Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioner contends that Respondent did not provide any services until November 2, 2015.

As relief, Petitioner seeks compensatory education.

VI. Findings of Fact

1. The Student is a X year old who is eligible for services as a student with Specific Learning Disability. He has significant issues in all academic areas including reading, writing, and mathematics, as reflected in scores showing him to be well below grade level in all areas. He does not know how to express or control his anger. (P-42-1; P-34-2; Testimony of Witness C; Testimony of mother).

2. During the 2014-2015 school year, the Student attended School A, a District of Columbia Public Schools (“DCPS”) [REDACTED] school. He had difficulty at School A. The Student manifested issues with anger that resulted in school suspensions,

and he received nine referrals to administrators for defiance, class disruptions, fighting, threats, and being out of location. (P-39)

3. An IEP meeting was held for the Student on December 15, 2014. The IEP resulting from that meeting contains goals in reading, writing, mathematics and communication/speech and language, as well as emotional, social and behavior goals. The emotional goal related to “coping strategy.” The IEP recommended five hours per week of specialized instruction inside general education inside reading and mathematics, two hours per week of specialized instruction in written expression inside general education, five hours per week of specialized instruction outside general education, 120 minutes per week of behavioral support services, and 60 minutes per month of speech-language pathology. (P-39)

4. On January 15, 2015, the Student was tested on his academic achievement. His scores on the Woodcock-Johnson III Normative Update Tests of Achievement were low. Broad reading was tested at the 7.8 age level (standard score 52), broad math was tested at the 8.10 grade level (standard score 62), and broad writing was tested at the 8.2 age level (standard score 60). (P-34-2)

5. While at School A, the Student was recruited to attend School B PCS as a football player by Mr. X, the School B PCS football coach. At the time he was recruited, the coach was told about his special needs. The coach said that there was an extra teacher in each class that is going to work with the Student, and assured the parents that he is going “to be okay.” (Testimony of mother; Testimony of father)

6. For the summer of 2015, the Student was sent to School B PCS. The summer program was arranged to help him catch up on some of the work so he could

move on to the next grade. There is academic activity in the summer school program at School B PCS. (Testimony of mother; Testimony of Witness E)

7. Thereafter, the Student enrolled at School B PCS for the 2015-2016 school year. Prior to enrollment, the school is not permitted, pursuant to Office of State Superintendent of Education regulations, to ask prospective students whether they have an IEP. (Testimony of Witness E)

8. After the first month at School B PCS, the Student “started to fail” and the parents were told to report to school about behavioral issues. There were numerous referrals and infractions, and the student was directed to attend behavior intervention classes. He was defiant, disrupted class, was disrespectful, had verbal altercations, and used profane language. He also did not complete assignments and did not develop work habits. (P-23-1; P-24-1; P-56-5)

9. On October 16, 2015, School B PCS received a copy of his IEP from DCPS and resolved to conduct a review of the student’s program within thirty days. On or about November 2, 2015, the school began to start implementing the IEP. The Student began to receive services in Math and English. Behavior support services began on or about October 21, 2015. Speech and language services were offered as of approximately November 10, 2015, but the student was absent during every scheduled session. (P-29-2; P-29-1-3; P-18; Testimony of Witness D)

10. Notwithstanding the special education services, the Student continued to have behavioral incidents at the school. There was an incident on November 4, 2015, and there was another incident resulting in an out of school suspension on November 10, 2015. (P-18-1)

11. At or about this time, the Student's grades were poor, with F grades in many classes. He regularly did not complete the work in class. (P-22-1-2; P-27-1)

12. On November 19, 2015, there was another behavioral incident. The Student had been extremely distracting and disruptive, getting out of his seat, talking, and bullying other students. He then refused to leave a classroom after being so asked by several adults. As a result, the students in the classroom were removed, and adults stood in the entryway of the classroom. The Student paced within the classroom for a time, and then became more agitated and tried to leave. In so doing, he "charged" Mr. T, who was standing in the entryway. Mr. T then placed him in a "basket hold." Then Mr. T and Witness E placed him on the floor via therapeutic restraint, with another adult holding his feet. At some point, the Student became unconscious, and EMS workers were called for assistance. By the time the EMS workers had arrived, the Student was sitting up, upset and agitated. (P-8-2; P-13-1-2; P-14-1; P-15-1; P-16-1)

13. After the incident, the parents tried to take him to school twice, only to be turned away. On or about December 5, 2015, the parents were told he could not come back to school pending an expulsion hearing. They were also told about the "therapeutic hold" on the Student during the incident on November 19, 2015. (Testimony of mother)

14. Instead of conducting a "thirty-day review," the school conducted a Manifestation Determination Review ("MDR") meeting on December 8, 2015. The parties discussed the incident on November 19, 2015. Respondent's representatives felt that the actions of the Student were not a manifestation of his disability, but the parent and the aunt thought they were. The Student's aunt said that the Student's difficulties were a function of his not understanding the work at school. The MDR team determined

that the incident was not a manifestation of his disability. (Testimony of Witness A; Testimony of Witness F; P-32-1, 3)

15. An IEP meeting was held on December 14, 2015. At the meeting, the Student's math teacher indicated that the Student works better on a 1:1 basis. The resulting IEP discussed that the Student struggled with anger, and reported that he becomes defiant and raises his voice and yells. However, no 1:1 services were provided. The IEP recommended 10 hours per week of specialized instruction inside general education in reading, 10 hours per week of specialized instruction inside general education in mathematics, and 6 hours per week of specialized instruction inside general education in written expression. At this meeting, the parent did not agree with the IEP and sought a more restrictive placement. (P-37; P-36-1; Testimony of Witness B)

16. Just before the December holiday break, School B PCS offered to temporarily place the Student at a library for fifteen hours of educational services on a weekly basis. The parent rejected this proposal. (Testimony of Witness F)

17. Testing was then conducted of the Student. Testing on the WISC-IV from January, 2016, showed very low to extremely low IQ scores, with a full scale IQ of 70, at the 2nd percentile. Woodcock-Johnson IV testing from this time showed that the Student was at the very low level in all areas, with standard scores of 40 in broad reading (7.4 age equivalent), 46 in broad math (7.9 age equivalent), and 62 in broad written language (8.8 age equivalent). BASC testing of the Student showed that the Student in the clinically significant range in hyperactivity, aggression, conduct problems, depression, atypicality, and attention problems. A speech and language evaluation found that the Student had

borderline overall language skills, with moderate receptive and expressive vocabulary deficits. (P-56-18-20; P-57-5)

18. An IEP meeting was held on January 19, 2016. At this meeting, School B PCS agreed to place the Student in a full-time specialized instruction environment outside general education. The school shared that it was offering School C, a non-public school offering full-time specialized instruction, as an interim placement for the Student. (P-49-1)

19. The parent initially did not want to send him to School C because of the disabilities of the children at the school. However, after reconsidering, the Student started attending School C on February 9, 2016. The Student has had “no issues” at School C, and he was formally accepted for placement at the school on March 11, 2016. (P-54-1; Testimony of Witness B; Testimony of mother; Testimony of father)

VII. 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-EDCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005). However, in reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability. 5-E DCMR Sect. 2510.16

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs

and provided in conformance with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In 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. Did Respondent fail to render a correct manifestation determination after the Student’s suspension from school on or about December 8, 2015? If so, did Respondent violate 34 CFR Sect. 300.530(e)? If so, did Respondent deny the Student a FAPE?

If a child with a disability is removed from the child’s current placement for 10 consecutive school days, disciplinary protections apply. 34 CFR Sect. 300.530(b)(2); 34 CFR Sect. 300.536. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial

relationship to, the child's disability or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 CFR Sect. 300.530(d)

Similarly, the District of Columbia requires, pursuant to 5-E DCMR. Sect. 2510.12. that the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team first considers all relevant information, including evaluation and diagnostic and results, or other relevant information supplied by the parents of the child; observations of the child; the child's IEP and placement; and any other material deemed relevant by the IEP Team, including, but not limited to, school progress reports, anecdotal notes and facts related to disciplinary action taken by administrative personnel. The IEP team must also determine that, in relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement; that the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

If there is a determination that the conduct is a manifestation of the Student's disability, the school district team may be required to place the Student back into his original school setting unless there is an agreement with the parent. The school district must also do a functional behavioral assessment -- unless it conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred. It must also implement a behavioral intervention plan for the child, or if a

behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior. 34 CFR Sect. 300.530(d)(f)(1) and (2).

Respondent bears the burden on this issue, and did not put forth much in the way of testimony or evidence to establish that the manifestation determination of December 8, 2015 was correct. The record establishes only that Respondent felt that the emotional outburst on November 19, 2015 could not have been a manifestation of the Student's disability because he was eligible for services as a student with a specific learning disability.

However, one need not be classified as a student with an emotional disturbance for a student to be protected by the disciplinary protections of the IDEA. For instance, in Bristol Township Sch. Dist. V. Z.B., Civ. No. 15-4604, 2016 WL 161600 (E.D. Pa., January 14, 2016), a behavioral incident occurred as a result of actions occasioned by the student with a designation of Other Health Impairment. Affirming the hearing officer, the court found that a manifestation determination review must look at whether the Student's disability had a direct or substantial impact on the incident after carefully examining all relevant available information. *Id.* @ *11-*12. The court noted that the MDR team failed to consider the impact of the Student's Attention Deficit Hyperactivity Disorder ("ADHD"), noting that Z.B.'s ADHD may sometimes manifest as a failure to listen to instructions or immediately obey teacher directives. *Id.*

There is nothing in this record to establish that Respondent carefully considered all the documents or meaningfully deliberated on whether the Student's learning disability might have been the cause, or had a direct or substantial relationship to, the instant

misbehavior. Nor was there any analysis of whether the LEA's failure to implement the Student's IEP for the first few months of the school year directly caused this misconduct. This kind of analysis was important in this case. There is evidence that the Student's learning disability did have an emotional component to it. The Student's most recent IEP clearly stated that he has emotional and behavioral problems in school. Moreover, the school had received a copy of the Student's IEP in October, more than a month before the MDR meeting. This IEP, which contains a social, emotional and behavioral goals, stated that, at his previous school, the Student had received nine referrals to administrators for defiance, class disruptions, fighting, threats, and being out of location. At School B PCS, those behaviors had continued, and the Student had been suspended for misconduct just a week or so before the incident in question. As Witness C pointed out, there are many students with learning disabilities who develop concomitant emotional issues in school. It was incumbent on School B PCS, at the MDR meeting, to at least explore the possibility that the learning disability ended up causing the behavioral issues that resulted in the suspension.

As a result of the foregoing, I find that Respondent failed to meet its burden to show that it conducted a prior MDR on December 8, 2015. As a result, Respondent denied the Student educational benefit, and therefore a FAPE.

2. Did Respondent fail to provide the Student with an appropriate IEP on 12/15/15? If so, did Respondent violate 34 CFR Sect. 300.320 and act in contravention of some of the principles in such cases as Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Under the Supreme Court's decision in Rowley, a public school district need not guarantee the best possible education or even a "potential-maximizing" one. 458 U.S. at

197 n. 21. Instead, an IEP is generally “proper under the Act” if “reasonably calculated to enable the child to receive educational benefits.” Id. at 207.

After an unsuccessful few months at School B PCS, Respondent’s response was to increase the amount of special education hours in the Student’s IEP. However, all of these hours were recommended in the general education environment. There is nothing in the record to suggest that this student did well in the general education environment – even when there was special education support available. All of the reports in the record indicate that the Student did poorly in the general education environment whether or not there was any specialized instruction assigned to him.

Witness C posited that that this is because of the Student’s learning disability. This makes sense. The Student’s academic levels, as revealed through testing the following month, were far below grade level. For instance, in reading, the student tested at a level equivalent to a student *seven* years younger than he is. There were similar problems in math, where the Student was functioning approximately six years below grade level. Accordingly, at the IEP meeting, the Student’s math teacher indicated that he would benefit from 1:1 instruction.

There is no provision for such instruction in the IEP. Moreover, there is no testimony or evidence in the record explaining how instruction could be differentiated so very much as to allow the Student to benefit from general education, even with specialized instruction. Maintaining a less restrictive placement at the expense of educational benefit or safety is not appropriate or required under the IDEA. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup

Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

Given the Student's poor performance at School B PCS and also at School A, I agree with Petitioner, and their expert, that it was unreasonable for the LEA to recommend continued general education instruction for this Student, even with additional "push-in" support. As a result of the foregoing, Respondent denied the Student educational benefit, and therefore a FAPE, through its IEP dated December, 2015.

3. Did Respondent fail to provide the Student with an appropriate placement after his suspension from school? If so, did Respondent fail to return the Student to his former placement or fail to provide an IAES pursuant to 34 CFR Sect. 300.532(b)(2)? If so, did Respondent deny the Student a FAPE?

34 CFR Sect. 300.530(f) states:

If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—

(1) Either—

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. (emphasis added).

The exceptions, in paragraph (g), do not apply here. As explained by the United States Department of Education: "(e)xcept for drugs, weapons, or serious bodily injury offenses under 34 CFR § 300.530(g), (where a child can be immediately removed for not

more than 45 school days regardless of whether the misconduct is a manifestation of the child's disability), the Part B regulations provide that a child is returned to the placement from which he or she was removed for ten days following a determination that the behavior giving rise to the disciplinary action was a manifestation of the child's disability. . ." Letter to Heufner, 47 IDELR 228 (OSEP 2007).

Here, after the Student was suspended, I find Respondent should have found the Student's conduct to have been a manifestation of his disability. On this record, there is enough evidence to establish that the Student's learning disability had a direct and substantial relationship with his behavior in view of the fact that the IEP clearly stated that the Student had serious behavioral issues including anger management issues, and given the expert testimony of Witness C to the effect that the Student's learning issues impacted on his behavior. Moreover, I find that the failure to implement the IEP had a direct relationship to the Student's behavioral issues, which began to spiral when he was not receiving any services.

Given this, Respondent should have offered to return the Student to his original placement at School B PCS. Instead, after finding that the behavior was not a manifestation of his disability, it waited for several weeks without providing the Student with any services. Then, Respondent offered the Student 15 hours a week in a library, which constitutes a change of placement.²

² A change in placement results from "a fundamental change in, or elimination of, a basic element of the educational program." Lunceford v. District of Columbia, 745 F.2d 1577, 1582 (D.C. Cir. 1984). In Letter to Fisher, the United States Department of Education Office of Special Education Programs (OSEP) called the issue of determining change of educational placement a "very fact-specific inquiry." Letter to Fisher, 21 IDELR 992 (OSEP 1994). OSEP concluded that whether a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter

As clearly stated in the regulation, an LEA is not allowed to change a student's placement after a manifestation determination establishing that the Student's behavior was a manifestation of his disability. Loathe though Respondent may have been to place the Student back in school in light of his disciplinary issues, it had to do so. By failing to provide the Student access to his original placement after the MDR, Respondent denied the Student educational benefit, and therefore a FAPE.

4. Did Respondent fail to implement the Student's IEP dated December, 2014, which IEP was in effect prior to the suspension during the 2015-2016 school year? If so, did Respondent violate 34 CFR Sect. 300.350 and precedent such as Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

"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 show 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).

At the beginning of each school year, each public agency must have *in effect*, for each child with a disability within its jurisdiction, an IEP, as defined in Sec. 300.320. 34 C.F.R. Sect. 300.323(a)(emphasis added). Moreover, LEAs must take action to obtain current IEPs from previous LEAs before servicing a student. The regulations state that

the child's educational program." Here, the 15 hours of services at the library was clearly a change of placement. Among other things, the new placement was to have no other students, was not located in a school, and constituted less than half of a typical week of school.

“the new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled. . .” 34 CFR Sect. 300.323(g)(1).

Additionally, LEA Charters within the District of Columbia must provide students with the services on their current IEP. According to 5-E DCMR Sect. 3019.3(c), the LEA charter must “develop and implement an IEP for an eligible child within the timelines set by IDEA, District of Columbia law, regulations and state policy, and shall provide special education and related services consistent with that IEP.”

Upon the Student’s entry into Respondent’s school, the Student’s then-current IEP, developed by DCPS, provided that the Student must receive five hours per week of specialized instruction inside general education in reading and mathematics, two hours per week of specialized instruction in written expression, five hours per week of specialized instruction outside general education, 120 minutes per week of behavioral support services, and 60 minutes per month of speech-language pathology is also offered. The record establishes that the bulk of these services were not provided until November, 2015, more than two months after school had started.

There is a question of fact as to whether Petitioner gave Respondent a copy of the IEP upon the Student’s entry into the school. The parents said they did. The school registrar said they did not. Since there is nothing in the record to corroborate the parents’ claim that they gave the school a copy of the IEP before the start of school for the 2015-2016 school year, I find that Petitioner did not meet her burden of showing that the parents in fact gave the school a copy of the IEP.

Nevertheless, I find that Respondent did not do enough to obtain a copy of the IEP upon the Student's entry into the school. I recognize that charters are put in a difficult position when they receive applications for transfers from DCPS students since they are not allowed to ask whether the applying student has an IEP. Moreover, Respondent's founder testified that the school did reach out to DCPS to get a copy of the Student's records.

Still, nothing was established in the way of detail. There was little testimony about exactly what was done, nothing about follow-up, and Respondent produced no documents requesting a copy of the IEP or other relevant documents from DCPS or from School A. The result was that this Student, with significant special needs, went without services for months and ended up with a *de facto* expulsion. Respondent should have made sure that the Student did not have an IEP before providing services to him, particularly in view of the fact that they already knew this Student because he went to summer school there and staff should have recognized he was functioning well below grade level and had significant emotional issues.

Additionally, Respondent knew about the Student's special education needs given the conversations that the parents had with the football coach who recruited him to the school. There is undisputed testimony that, while at School A, the Student was recruited to attend School B PCS as a football player by Mr. X, the School B PCS football coach. At the time he was recruited, the coach was told about his special needs. The parents testified that the coach said that there was an extra teacher in each class that is going to work with him, and that he is going "to be okay." The football coach was not called as a witness by Respondent to contest any of these statements.

It is noted that Respondent argued that the School A IEP had expired, but this is inaccurate. The IEP, written in December, 2014, was still in effect during the time that the Student was at School B PCS. Not only was the IEP less than a year old, it contains goals whose expected date of achievement is December, 2015.

As a result of the foregoing, I find that School B PCS failed to implement the Student's IEP from the start of school, 2015-2016 school year, through November 2, 2015. School B PCS therefore denied the Student educational benefit, and therefore a FAPE, during this period of time.

VIII. Relief

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to “grant such relief as [it] determines is appropriate.” The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be “appropriate.” Absent other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

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.

Recently, the Circuit expressed some concern about the breadth of compensatory education awards in the District of Columbia. In B.D. v. District of Columbia, No. 15-7002, 2016 WL 1104846 (D.C. Cir. March 22, 2016), the Circuit elaborated on the appropriate way to calculate compensatory education. Judge David Tatel, the author of Reid, explained that a proper award not only makes up for educational services that were missed, but also compensates for any regression suffered by the Student as a result of the deprivation. Id. @ *5.

Petitioner has submitted a compensatory education plan and supporting testimony from Witness B and Witness C in support of that proposal. In particular, Petitioner seeks three hundred hours of individualized tutoring through the Lindamood-Bell reading

intervention program, a behavioral summer program at Institute X, and School D Behavioral summer camp.

In regard to the tutoring, the record indicates that the Student received inappropriate educational services from the start of the school year through early November, 2015. Then, after the behavioral incident on November 19, 2015, he did not receive an offer of FAPE until he was offered School C in mid-January, 2016. As a result, I calculate that he was denied access to a FAPE from August through mid-January except for a period of time in November.

I agree with Witness C that the Lindamood-Bell methodology would provide appropriate remediation for this Student consistent with Reid. She provided sufficient explanation for the importance of this program and how this program would result in remediation and educational benefit for the Student. However, the compensatory education plan in the record assesses the Student's deprivation without considering the fact that Respondent did offer the Student an appropriate placement at School C in January. The plan appears to calculate services assuming a deprivation through the date of this decision, which is inappropriate. Accordingly, I find that the request for 300 hours of Lindamood-Bell services be reduced to 175 hours of services, which should account not only for the student's failure to make progress but also for the Student's likely regression during the period of time of FAPE violation.

In regard to the other requests compensatory education, these are requests for services that correspond to a deprivation during the summer. However, the Student did not allege, or prove, that there was a FAPE deprivation over the summer, 2015. Accordingly, I will deny the remaining requests for compensatory education.

IX. Order

As a result of the foregoing:

1. Respondent is hereby ordered to provide the Student with two hundred hours of 1:1 individualized tutoring in the Lindamood-Bell methodology, to be provided by an experienced provider of such services, tutoring to be completed by 12/31/17;
2. Petitioners' other requests for relief are hereby denied.

Dated: April 11, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

X. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: April 11, 2016

Michael Lazan
Impartial Hearing Officer