

**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
February 20, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a student who is not eligible for services.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on December 6, 2013 in regard to the Student. This Hearing Officer was appointed to preside over this case on December 11, 2013.

A Response was filed by the District denying this contention on December 16, 2013. This Response was timely filed. A resolution meeting was not held in this case. The resolution period ended on January 5, 2014.

On January 14, 2014, this Hearing Officer held a prehearing conference. Elizabeth Jester, Esq., counsel for Petitioner, appeared. Lynette Collins, Esq., counsel for Respondent,

appeared. A prehearing conference order issued on January 17, 2014 summarizing the rules to be applied in this hearing and identifying the issues in the case.

Petitioner moved for an expert observation of the Student by motion papers dated January 7, 2014. Respondent opposed this motion by papers dated January 8, 2014. This motion was denied by decision dated January 24, 2014.

A

Petitioner entered into evidence exhibits 1-19; Respondent entered into evidence exhibits 1-12. Petitioner presented as witnesses: Petitioner; Witness A, an expert in special education, specifically emotional disturbance, learning disabilities, eligibility determinations, and IEP development. Respondent presented: Witness B, a social worker; Witness C, a special education teacher; Witness D, a special education coordinator; Witness E, a psychologist.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUES

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

1. Should DCPS have classified the Student as eligible for special education services as a Student with an emotional disturbance from January, 2013 through present, and provided the

Student with and appropriate IEP and educational placement? If so did DCPS deny the Student a FAPE?

2. In connection to the IEP meetings for July 24, 2013 and October 1, 2013, did DCPS fail to include appropriate and required team members? If so, did DCPS deny the Student a FAPE?

3. In connection to the IEP meetings for July 24, 2013 and October 1, 2013, did DCPS fail to conduct a Functional Behavior Assessment and Vocational Assessment?

4. In connection to the IEP meetings for July 24, 2013 and October 1, 2013, did DCPS fail to meaningfully consider the 4 independent evaluations previously obtained by the Petitioner?

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 attends School A in Washington, D.C. (R-1-1)
2. Petitioner is the Student's mother. (Testimony of Petitioner)

(Testimony of Petitioner)

5. The Student has a language disorder. (P-3-7)
6. The Student has particular difficulty in the areas of recalling auditory information, providing word definitions, associating words and explaining word relationships, recalling details, receptive vocabulary knowledge, and sequencing story events. (P-3-7)
7. The Student has expressive vocabulary deficits which put him at the 5th percentile rank. (P-3-3)

8. The Student's scores on the CELF-4 from May, 2013 were low in many respects. The Student's percentile rank in recalling sentences (2 percent), word classes – receptive (2 percent), word classes-total (5 percent), word definitions (2 percent), understanding spoken paragraphs (1 percent), were all very low. (P-3-4)

9. WISC-IV scores in February, 2013 indicated a Full Scale IQ of 86, with weakness in Verbal Comprehension Index (standard score of 77). (P-1-6)

10. Woodcock-Johnson Tests of Achievement- III scores from February, 2013 indicated standard scores of 83 in broad reading, 93 in basic reading, and 77 in reading comprehension. Broad math score was an 85. Math calculation score was an 89, with math reasoning an 86, broad written language an 87, and written expression an 87. His academic fluency standard score was a 78, and his academic skills score was a 90. (P-1-9-11)

11. The Student meets the criteria for diagnosis with a reading disorder. The Student's reading skills have stagnated at approximately the 5th grade level. (P-1-12-13)

12. BASC-2 results from May, 2013 (interview with Student) indicate that the Student has areas of moderate concern in self-reliance, sense of inadequacy, and interpersonal relations. (P-2-12)

13. BASC-2 results from May, 2013 (interview with geometry teacher) indicate that the Student has areas of moderate concern in attention problems, school problems, adaptability, social skills, leadership, study skills, functional communication, and adaptive skills. (P-2-13)

14. The Student has been diagnosed with Cannabis Abuse, and Disruptive Behavior Disorder NOS. Disruptive Behavior Disorder NOS is characterized by a pattern of oppositional or negativistic behaviors that do not meet the criteria for oppositional defiant disorder or conduct disorder. (P-1-12)

15. The Student has been diagnosed with Oppositional Defiant Disorder. (P-2-8)

16. The Student's spelling is poor. (P-2-5)

17. The Student's reading skills are very poor. (P-2-5)

18. The Student has limited writing skills, with minimal legibility and weak grammar.

(Testimony of Witness A)

19. The Student has difficulty in math. (P-2-5)
20. In terms of academic learning, the Student's language deficits can be seen in difficulty comprehending vocabulary, inaccurate responses to questions, incomplete note taking, organizational errors, lack of details in oral and written responses, and difficulty retaining new information. (P-3-8)
21. The Student is frequently absent from class. This is in part a manifestation of his inability to access the curriculum. (Testimony of Witness A)
22. The Student has attentional problems. (Testimony of Witness A; P-2-5)
23. He will listen, but if he does not want to do what he is told, he will not do it. (P-1-5)
24. He exhibits poor judgment and insight and minimizes his problem areas. (P-1-5)

26. The Student makes minimal effort to complete assignments on a consistent basis. (R-1-1)
27. The Student can be respectful at times. (Testimony of Witness C)

30. The Student does want to go to school. (Testimony of Witness B)
31. The Student is overwhelmed by his schoolwork, feels that he is "dumb," expresses symptoms of anxiety such as twitching and stuttering when asked to perform reading tasks. (P-1-13)
32. This anxiety has contributed to his school avoidance. (P-1-13)
33. The Student would benefit from a token economy system. (P-2-8)
34. The Student would benefit from counseling in school. (P-2-8)
35. The Student would benefit from individual psychotherapy. (P-1-13)
36. The Student requires a speech and language pathologist to facilitate auditory memory, receptive language skills, and vocabulary skills. (P-3-8)

37. The Student would benefit from tutoring services in the area of reading comprehension. The Student needs multi-sensory reading support, materials broken down, and chunking. (Testimony of Witness A; P-1-14; Testimony of Witness B)
38. The Student could benefit from a mentor to assist him during out of school hours. (P-1-14; Testimony of Witness A)
39. The Student would benefit from additional time to work on his tests. (Testimony of Witness B)
40. The Student would benefit from extra response time, support information provided in spoken format with visual aids, repetition of instructions and questions, additional practice, use of hands on manipulatives, use of visual aids, frequent breaks, preferential seating, minimized distractions, and small group instruction. (P-3-10)
41. The Student would benefit from supports with written language, reading, and in retaining information. (Testimony of Witness A)
42. He needs supports to remember information, including notes provided and structure. (Testimony of Witness A)
43. He needs a formalized FBA and BIP. (P-3-8; Testimony of Witness A)
44. The Student would benefit from therapeutic support services. (Testimony of Witness A)
45. The Student has had behavioral issues for his entire academic career. (Testimony of Petitioner)
46. He went to School B until second grade. He had some behavioral issues, though no learning issues were reported. (Testimony of Petitioner)
47. Thereafter, he went to School C, where he had more behavioral issues. The result was calls home for fighting about once a week and suspensions. The Student would be distracting to the teachers at School C. (Testimony of Petitioner; P-1-4)
48. The Student did not do his homework regularly at School C. (P-1-4)

49. He went to School D PCS for fourth through eighth grade, when his grades were better but he had more behavioral issues. (P-1-5)

50. At School D PCS, the staff had some success with the Student's issues because the school provided a smaller setting. (Testimony of Petitioner)

51. In the ninth grade, the Student went to School E, but struggled. He got into fights, got caught smoking in school, failed math and English, and had to go to summer school. (Testimony of Petitioner)

52. The Student was caught smoking marijuana at School E in ninth grade. (P-2-2)

53. The Student failed the ninth grade. The Student received grades of D or F in all academic subjects at School D. (P-2-2; P-14-1)

54. For 2012-2013, the Student went to School F. The Student's grades were poor after a fair start. (Testimony of Petitioner)

55. The Student's attendance has been poor since the start of the 2012-2013 school year. (R-7-4)

56. The Student had an attendance plan created by the "A team" with school staff in November, 2012. This plan indicates that a team member should follow the Student's attendance closely and communicate with the parent. No specific interventions were recommended. (P-6-4; P-8-2)

57. An attendance plan was written for the Student dated December 12, 2012. This plan recommended that an "A Team" member check-in and check-out with the Student, that he leave home earlier, that he remember to sign in to class, that there should be calls home, absent letters home, a Metro Card, and a referral to counseling. (R-3-3)

58. The Student's attendance support plan dated April 19, 2013 does not recommend any actions to be taken. (P-9-2)

59. A document called "Academic/Behavioral Success Plan" was written for the Student in 2013. This document was based on observations of the Student outside of class. (R-1-1)

60. This plan recommends: counseling, private meetings with teachers, documenting student stressors, extended time to complete assignments, allowing make-up tests, verbal warnings, communication with the parent, identifying cues that make the Student upset, allowing the Student “cool down” time, use of “time-out” rooms. (R-1-1-3)

61. Petitioner’s attorney requested an evaluation of the Student in or about 2013. (Testimony of Petitioner)

62. A July 24, 2013 IEP meeting was then held with a “summer team.” At the meeting, there was a speech and language therapist, a general education teacher, a special education teacher, Petitioner, her lawyer, an occupational therapist, Witness D, 2 school psychologists, and an assistant principal. The team did not include a general education teacher who knew the Student. No conclusion was reached as a result of this meeting. The team decided to determine eligibility at a later date. (Testimony of Witness D; Petitioner; P-5-1)

63. At the July meeting, there were 4 evaluations reviewed – a psychoeducational assessment, a psychological assessment, a speech and language therapy assessment, and an occupational therapy assessment. (Testimony of Witness D)

64. The Student’s present levels of performance were not available at this review. (Testimony of Witness D)

65. At the July meeting, Respondent did not assess whether the Student’s attendance issues were related to his learning issues. Respondent did indicate that an FBA should be conducted. (P-5-1-7)

66. At the October 1, 2013 IEP meeting, there was no general education teacher who was familiar with the child. Appearing was Witness B, Witness C, two social workers, and a speech and language therapist. (Testimony of Witness D)

67. At the meeting there was no discussion of attendance issues. The team felt the Student had to be there at the meeting for the team to understand his attendance issues. (Testimony of Witness D)

68. The team felt that speech and occupational therapy services were not warranted. (Testimony of Witness D)

69. Witness E was critical of the assessments of the Student, feeling that an executive functioning test should have been conducted, a Conners test should have been done, and a work sample should have been assessed. (Testimony of Witness E)

70. Witness E was critical of a psychological assessment because she felt the because the psychologist did not provide adequate data on tests. (Testimony of Witness E)

71. Witness E felt that Respondent could not rule out substance abuse or attendance issues in connection to the Student's emotional issues. (Testimony of Witness E)

72. Witness E's expressed that if there are attendance issues, the Student cannot then be deemed eligible for services. (Testimony of Witness E)

73. Respondent never initiated any of the assessments that Witness E thought were needed. (Testimony of Witness E)

74. The Student was determined to be ineligible for services at the meeting. The team could not get baselines for present levels and then recommended the "SST" process, referring the case to Witness B. (Testimony of Witness D)

75. At the October 1, 2013 meeting, an FBA was promised by the District, with a BIP to be done later if needed. (P-6-3)

76. At the October meeting, Respondent did not meaningfully consider whether the Student's disability caused the motivation and attendance issues although this issue was raised by Petitioner's counsel. Respondent indicated that the Student's reading and language skills were appropriate. Respondent referenced the Student's two school attendance plans, and indicated that the Student's truancy continued. (P-6-5; P-10-4-5; P-11-5)

77. Respondent's position was simply that the Student should go to school. (P-6-5)

78. During the 2013-2014 school year, the Student is failing all his core classes. (Testimony of Petitioner)

79. School F staff held a meeting in Fall, 2013 with Witness B and and Teacher A present. Teacher A indicated that the behavioral prompts were not working to address the Student's issues. They

determined that the Student should bring progress sheets to the school that were to be signed daily by the teacher, with regular check-ins. (Testimony of Petitioner)

80. The Student completed the progress sheet form once. (Testimony of Petitioner)

81. The Student has worked fairly well in groups during the year. However, he has not been turning in any work. He is not engaged in the lessons. His attendance is poor. (Testimony of Witness C)

82. An FBA was conducted of the Student by Witness B but this FBA was not based on any observations of the Student in the classroom. (Marsh)

83. At School F, the Student has had trouble staying away from other children that he has previously gotten in trouble with. (P-2-6)

84. The Student has been struggling to focus in class. (P-3-2)

85. As of November, 2013, the Student's academic grades for the 2013-2014 school year ranged from B- (Spanish) to F (Environmental Science, Jazz Band/Orchestra), with Ds in business communications and English II and a C in World History. (P-17-1)

86. As of November, 2013, the Student was was tardy 24 days and absent 2 days. (P-17-2)

86. Most of the Student's absences are from skipping classes. (R-4-2)

87. I found all of the witnesses credible in this proceeding.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d),

300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

1. The July and October, 2013 IEP Meetings.

The IDEA defines "child with a disability" as: "a child evaluated in accordance with Sects. 300.304 through 300.311 as having...a serious emotional disturbance, ... an other health impairment, a specific learning disability, ... or multiple disabilities, and who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401 (3) (A); 34 C.F.R. §300.8 (a).

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

As the above statutory criteria make clear, the IDEA does not require a school district to provide special education and related services to every student who may struggle academically. Only certain children with defined disabilities are eligible for the IDEA's benefits. See, e.g., Alvin Indep. School Dist. v. A.D., 503 F.3d 378 (5th Cir. 2007)(student achieved passing grades despite procedural issues). Moreover, it is not sufficient for a child merely to be diagnosed with

a specified medical or psychological condition. There must also be a demonstrated adverse effect on the child's educational performance, such that the child needs special education and related services to receive an educational benefit. 34 C.F.R. §§300.8(c)(4)(i), (c)(9)(ii); see N.C. v. Bedford Central School District, 51 IDELR 149 (2d Cir. 2008)(behavioral problems stemmed from drug use); N.G. v District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008)(child's depression affected his schoolwork).

The regulations also provide that the "term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance" as defined under subparagraph (c) (4) (i). 34 CFR Sect. 300.8 (c) (4) (ii); 5-E DCMR Sect. 3001.1.

The record here indicates that the Student has exhibited behavioral issues and is diagnosed with Oppositional Defiant Disorder and Disruptive Behavior Disorder NOS. The Disruptive Behavior Diagnosis was not made by a psychologist who was retained by Petitioner. Instead, this diagnosis was made by a Psychologist A, an impartial psychologist who assessed the Student through the District of Columbia Court system. This psychologist connected the Student's behavioral issues to his schoolwork. The psychologist concluded that the Student is overwhelmed by his schoolwork, feels that he is "dumb," and expresses symptoms of anxiety such as twitching and stuttering when asked to perform reading tasks. This psychologist concluded that this anxiety has contributed to his school avoidance. This psychologist also noted that the Student has stagnated at the 5th grade reading level and has a Reading Disorder.

At the IEP reviews, none of this language in Psychologist A's report was meaningfully discussed or analyzed. Instead, Respondent simply determined that the Student could not be eligible for special education services because he had attendance and drug abuse issues. N.G., 556 F. Supp.2d at 28 (hearing officer was presented with reports that connected the Student's

difficulties with attendance and his disabilities; the hearing officer disregarded the reports and relied on an observation; District Court reversed).

Respondent had a duty to more carefully review the assessments provided by the Petitioner. An LEA is required to review all existing data of the child, including the reports provided by the parent. 34 CFR Sect. 305(a)(1)(i). While Respondent did review the 4 assessments provided by the parent at the July and October reviews, it did not do so in a manner that would allow for a thoughtful and full discussion of the issues raised, including the observations of Psychologist A pertaining to the Student's school anxiety. A reasonable review of these assessments would have resulted in a finding that the Student was eligible for services as, inter alia, a student with an emotional disturbance. The assessments and the record generally indicate that the Student has been unable to achieve in high school and has not reacted appropriately to interventions provided by the school. These issues have lasted for a significant period of time and cannot be explained by intellectual, sensory or health factors.

In determining the ineligibility of the Petitioner, Respondent did not rely on its own formal assessments. In particular, as pointed out by Petitioner, Respondent did not do a formal FBA in connection to the Student's July and October, 2013 IEP meetings. An FBA may be required to ensure that the child is assessed in all areas of suspected disability. 28 U.S.C. Sect.1414(b)(3); 34 C.F.R. Sect.300.304(c). Respondent has an "affirmative duty" to address a Student's truancy. Lexington County Sch. Dist. One v. Frazier, 57 IDELR 190 (D. S.C. 2011)(SRO's ruling that District failed to assess Student's truancy issue upheld by District Court); Springfield School Committee v. Doe, 623 F.Supp.2d 150 (D. Mass 2009)("behavior management services" fall within the scope of IDEA); cf. R.B. v. Mastery Charter School, 762 F. Supp.2d 745 (E.D. Pa 2010)(District had duty to respond to absences through educational

intervention); Independent Sch. Dist. No. 284, Wayzata Area Sch. v. A.C., 258 F.2d 769 (8th Cir. 2001)(neuropsychological assessment conducted of truant student; assessment was relied upon by the court to determine appropriate educational program for Student); see also Urban Pathways Charter School, 112 LRP 27526 (Pennsylvania, 2012)(District had duty to explore reasons behind absences); Corpus Christi Ind. Sch. Dist., 57 IDELR 240 (Texas 2011)(District denied FAPE when truancy was not properly assessed by District).

Throughout its presentation, Respondent suggests that this Student simply does not want to go to school. Yet Respondent's witness, Witness B, indicated that he believes in the Student and that the Student in fact does want to go to school. The weight of the evidence here suggests to this IHO that this Student has an emotional disturbance that cannot be explained by intellectual, sensory, or health factors, leading to inappropriate types of behavior or feelings under normal circumstances.

Finally, I agree with Petitioner that the IEP team in July did not include appropriate team members. The regulations require that an IEP team include a general education teacher "of the child," and neither the July review nor the October review included such a teacher. 34 CFR Sect. 300.308(a)(1). I find that the lack of such a teacher did in fact compromise the team's ability to determine the Student's needs, particularly in regard to the July, 2013 IEP meeting. In fact, the team admitted at both IEP meetings that the team did not have sufficient information to determine the Student's levels of performance.

Parenthetically, this Student's behavioral issues go way back to when he was just starting school. There is unrebutted testimony in the record that the Student's behavioral issues have impacted his schoolwork going back to kindergarten and that his parent was called into school every week going back as far as third grade. Additionally, the record indicates that the Student

has been unwilling to comply with basic school rules such as listening in class, and handing in work. The Student will not do what he does not want to do, exhibits poor judgment and insight, and has yelled at and threatened Respondent's staff. As a result, the Student's grades have been very poor since he has started high school.

As a result of the foregoing, I find that this Student should have been assessed through an FBA at the July and October meetings, that Petitioner's 4 assessments should have been more carefully reviewed at such meetings, and that the Student should have been determined to be eligible for services as a Student with an emotional disturbance at such meetings. As a result, I am ordering that this Student be deemed eligible for services as a Student with an emotional disturbance, and I am determining that the Student was denied a FAPE by the IEP team's decision to find the Student ineligible at the July, 2013 and October, 2013 meetings.

2. 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 confers 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).

Petitioner asks for a wide variety of relief. Petitioner asks for compensatory education in the form of academic tutoring in math, spelling and reading; counseling 5 hours per day and 5

days a week; 5 hours per day and five days per week of psychosocial skills development; and 25 hours per week of wraparound services.

In regard to the Student's future placement, Petitioner asks for a full-time therapeutic setting, a low teacher to student ratio in class, counseling, speech and language therapy, occupational therapy, extended school year services, mentoring, tutoring, wraparound services, a vocational assessment, and an independent FBA. Petitioner also asks that recommendations from the Student's assessments be incorporated into an IEP.

A. Compensatory Education.

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.

Petitioner's compensatory education claims are not clearly connected to the FAPE deprivation in this case. Rather, Petitioner's compensatory education claims appear to be a formulation of what might be an appropriate program for the Student irrespective of the Student's FAPE deprivation. The plan also does not take into account the Student's schedule, which would be burdened by all the services that are sought by Petitioner. Petitioner also presents no authority to substantiate such a comprehensive award of compensatory education for a deprivation of services that is for a six month period.

The record, including the assessment of Evaluator A, indicates that the Student required remedial reading instruction during the 2013-2014 school year. Accordingly, applying the standards in Reid, I find appropriate compensatory education would consist of tutoring in the area of reading. I will therefore order that the Student receive six months of remedial reading tutoring, on a 1-1 basis, for two hours per week through to the end of the current school year and throughout the summer, 2014. This tutoring shall be multi-sensory in nature. The tutoring shall be premised on the Student's regular attendance at the tutoring. If the Student misses three tutoring sessions without providing documentation explaining the reasons for the absence, Respondent may terminate the tutoring.

B. The Student's Educational Program.

In regard to the request for a full time therapeutic setting, the record does not support this request. Despite the recommendation from Evaluator A to the effect that the Student requires such a setting, and suggestion from Witness A that the Student needs specialized instruction in all academic classes, this IHO is not convinced that such a setting would be consistent with the intention of the IDEA to provide students with an education in the least restrictive environment. Though the Student needs remediation in regard to his reading issues, testimony from the parent

suggested that this is a Student who can understand some of the work at school. Petitioner did not clearly indicate that she wanted the Student to be placed in a therapeutic, full time special education setting. Instead of ordering a full-time therapeutic setting, and in consideration of the Student's need for additional assistance in reading, I will order that the Student's IEP require that the Student receive at least 5 hours per week of specialized instruction within general education to address the Student's reading issues.

In regard to Petitioner's requests for mentoring, counseling, speech and language therapy, and FBA, the record supports the request for an FBA for this Student. The FBA should focus on the Student's attendance issues. The FBA should focus on antecedents to the behaviors, on the theory that a change in the antecedents can lead to a change in the behaviors. C.F. ex rel. R.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *9 (S.D.N.Y. 2011); R.K. ex rel. R.K. v. New York City Dep't of Educ., 2011 WL 1131492 at *19 (S.D.N.Y. 2011). I note that, though there is testimony here that an FBA has been conducted of the Student, there is nothing in the record to suggest that an FBA has been conducted consistent with the standards enumerated herein.

In regard to the request for speech and language therapy, I agree that this Student should receive speech and language therapy. The comprehensive speech and language therapy assessment in the record recommends one hour per week of speech and language therapy for this Student (P-3-9). The report from Respondent confirms that the Student has delays in speech and language, including a standard score of 66 in Language Content on the CELF-4. I will direct that the IEP require one hour per week of speech and language therapy for this Student going forward.

In regard to the request for occupational therapy, the comprehensive occupational therapy assessment in the record recommends one hour per week of occupational therapy. (P-4-11) The Respondent's reviewer agreed with this recommendation. (R-10-4) I will order that the IEP require one hour per week of occupational therapy for this Student going forward.

In regard to the request for counseling, the record amply supports the Student's need for counseling to address behavioral concerns already enumerated herein. I will order that the IEP be written to require that the Student receive two hours of counseling per week.

In regard to the request for mentoring and wraparound services, Petitioner has not explained specifically how these services would improve the Student's academics. Petitioner also did not provide much detail on exactly what the nature of these services might be. Petitioner also has not identified any particular companies or individuals who might provide this service to the Student. While the record certainly indicates that this Student would benefit from mentoring, I find that counseling services, administered properly, can provide the Student with the services he needs to address his academics. Under the circumstances, I decline to order such mentoring and wraparound services.

In regard to the request for a vocational assessment, there is no testimony in the record about the Student's needs in this connection. Respondent is under an obligation to provide transition services to the Student pursuant to the IDEIA. In regard to transition, these services are defined as "a coordinated set of activities for a child with a disability" that is a "results oriented process" that is "based on the individual child's needs." 34 C.F.R. Sect. 300.43. The focus of transition services is to "improve the academic and functional achievement of a child with a disability, to facilitate the child's movement from school to post-school activities." Id. Services must be "based on an individual child's needs, taking into account the child's strengths,

preferences and interests” and includes instruction, related services, community experiences, employment and other post-school adult living objectives, and “if appropriate” acquisition of daily living skills and provision of a functional vocational evaluation. Id.; see also 71 Fed. Reg. 46579 (2006)(definition of transition services is written broadly). I find that there is no need for this IHO to add to requirements that are already enumerated in statute and regulation.

In regard to the request for ESY services, there is nothing in the record to suggest that this Student will substantially regress during the summer. Accordingly, I find ESY services not warranted on this record.

Finally, in regard to the Petitioner’s requests for additional recommendations to be incorporated into the Student’s IEP, I will order that the following recommendations be placed in an IEP: extra response time; support information provided in spoken format with visual aids; repetition of instructions and questions; additional practice; use of hands on manipulatives; use of visual aids; frequent breaks; preferential seating; minimized distractions; notes provided and small group instruction. The Student will also receive a BIP after the FBA is completed.

ORDER

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

1. Respondent is adjudged to have denied the Student a FAPE by failing to determine the Student to be eligible at the July, 2013 and October, 2013 IEP meetings;
2. The Student shall receive compensatory education in the form of 1:1 academic tutoring in reading, two hours weekly, for the duration of the 2013-2014 school year and the summer of 2014;

3. Tutoring shall be premised on the Student's regular attendance at the tutoring. If the Student misses three tutoring sessions without providing documentation explaining the reasons for the absence, Respondent may terminate the tutoring;

3. Respondent shall immediately endeavor to conduct an FBA of the Student consistent with the requirements of this HOD to determine an assessment of the reasons behind the Student's attendance issues;

4. The FBA will be completed within 20 days of the issuance of this HOD;

5. A BIP shall be written within 10 days of completion of the FBA;

6. An IEP team will meet within 30 days of the issuance of this HOD to develop an IEP for the Student;

7. Such IEP shall provide that the Student receive 1 hour of speech and language therapy per week; 1 hour of occupational therapy per week; 2 hours of counseling per week;

8. Such IEP shall provide that the Student receive at least 5 hours of specialized instruction in reading per week within general education;

9. Such IEP shall also provide that the Student receive the following interventions: extra response time; support information provided in spoken format with visual aids; repetition of instructions and questions; additional practice; use of hands on manipulatives; use of visual aids; frequent breaks; preferential seating; minimized distractions; noted provided and small group instruction.

Dated: February 19, 2014

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Date: February 19, 2014

Michael Lazan
Impartial Hearing Officer