

**District of Columbia
Office of the State Superintendent of Education**

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Student Hearing Office
July 28, 2014

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer:</p> <p>Charles M. Carron</p> <p>Date Issued:</p> <p>July 28, 2014</p>
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HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed June 2, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s parent, against Respondent, District of Columbia Public Schools (“DCPS”).

On June 3, 2014, Keith Seat was appointed as the Impartial Hearing Officer.

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

On June 6, 2014, the undersigned was appointed as the Impartial Hearing Officer *vice* Hearing Officer Seat.

On June 12, 2014, Respondent filed its timely Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on June 16, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on July 2, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on July 3, 2014 and will conclude on August 16, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on June 18, 2014 at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by July 2, 2014 and that the Due Process Hearing (“DPH”) would be held on July 10, 2014, continuing, if necessary, on July 14, 2014. The undersigned issued a Prehearing Conference Summary and Order (the “PHO”) on June 18, 2014, and a Supplemental Prehearing Conference Summary and Order (the “Supplemental PHO”) on June 19, 2014.

The parties filed their disclosures on July 2, 2014.

The undersigned postponed the DPH to July 24, 2014 for reasons explained in the Order Rescheduling Due Process Hearing issued on July 9, 2014.

On July 10, 2014, the undersigned issued an Order Changing Time of Due Process Hearing and Ruling on Objections to Proposed Exhibits (the “July 10, 2014 Order”).

On July 21, 2014, Petitioner amended her disclosure to substitute a witness. Respondent did not consent to the substitution. After the close of business on July 21, 2014, Petitioner filed a Motion for Leave to Present Witness or in the Alternative for Continuance (the “Motion”).

On July 23, 2014, the undersigned held oral argument on the Motion and reserved a decision on the Motion until the witness in question testified at the DPH.

No other motions were filed by either party and the DPH was held on July 24, 2014 from 9:02 a.m. to 12:15 p.m. at the Student Hearing Office, 810 First Street, NE, Room 2004, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, Petitioner's proposed Exhibits P-5, P-7 through P-13 and P-20 were admitted without objection. Exhibits P-1 through P-4 and P-14 through P-19 were admitted over Respondent's objections for the reasons stated in the July 10, 2014 Order. Respondent's objection to P-6 was sustained for the reasons stated in the July 10, 2014 Order, excluding that exhibit. Thus, Petitioner's Exhibits P-1 through P-5 and P-7 through P-20 were admitted into evidence.

At the DPH, Respondent's Exhibits R-1 through R-7 were admitted over Petitioner's objections for the reasons stated in the July 10, 2014 Order.

The following witnesses testified on behalf of Petitioner at the DPH:

Petitioner;

Director, Clinical Services, Non-Public School "Clinical Director"; and
Paralegal/Educational Advocate, who was admitted, over

Respondent's objection, as an expert in the development
of compensatory education plans.

The following witness testified on behalf of Respondent at the DPH:

Special Education Coordinator/LEA Representative ("SEC").

The parties gave oral closing arguments and did not file written closing arguments or briefs.

On July 25, 2014, the undersigned issued an Order Granting in Part and Denying in Part Petitioner's Motion for Leave to Present Witness or in the Alternative for Continuance, allowing the substitution of the witness and denying the request for a continuance as moot.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the DPC are as follows:

The Student is male, of Current Age, and attends Current Grade at Non-Public School, as a result of a unilateral parental placement. The Student has been determined to be eligible for special education and related services as a child with Multiple Disabilities under the IDEA.

Petitioner claims that Respondent has denied Student a FAPE as discussed in Section IV *infra*.

IV. ISSUES

As discussed at the PHC and confirmed in the PHO, the following issues were presented for determination at the DPH:

(a) Since September 8, 2013, has Respondent violated IDEA's procedural requirements and/or denied the Student a FAPE by failing to assess and reevaluate him in all areas of suspected disability?

(b) Since September 8, 2013, has Respondent violated IDEA's procedural requirements and/or denied the Student a FAPE by failing to develop an Individualized Education Program ("IEP") for him, including placement?²

(c) Since September 8, 2013, has Respondent violated IDEA's procedural requirements and/or denied the Student a FAPE by failing to determine a Location of Services ("LOS") for him?³

(d) From September 8 through December 18, 2013, did Respondent deny the Student a FAPE by failing to provide the dedicated aide prescribed in the IEP from Charter School?

(e) From September 8 through December 18, 2013, did Respondent deny the Student a FAPE by failing to provide the counseling prescribed in the Charter School IEP?

² The DPC asserted that no IEP was developed for the Student, not that Respondent developed an IEP that was insufficient. Thus, the *sufficiency* of an IEP is not an issue in this case.

³ The DPC asserted that no LOS was determined for the Student, not that Respondent determined an LOS that was unable to implement his IEP. Thus, the *appropriateness* of an LOS is not an issue in this case.

V. RELIEF REQUESTED

Petitioner requests the following relief:⁴

- (a) a finding that Respondent denied the Student a FAPE;
- (b) an Order that Respondent reimburse the cost of the Student's attendance at Non-Public School from December 18, 2013 through the end of School Year ("SY") 2013-2014;
- (c) an Order that Respondent place and fund the Student's prospective attendance at Non-Public School;
- (d) an Order that Respondent immediately conduct a comprehensive psychological assessment of the Student;
- (e) an Order that Respondent reevaluate the Student immediately upon completion of the comprehensive psychological assessment;
- (f) an Order that, immediately upon completion of the reevaluation, Respondent review and revise the Student's IEP, provided that the IEP not be revised in any way inconsistent with the Hearing Officer's Order pursuant to (c) above;
- (g) compensatory education, or an Order that Respondent fund a compensatory education evaluation at market rate, with the Hearing Officer

⁴ In the DPC, Petitioner also requested attorney's fees and costs, which only a court can award. Petitioner also requested an Order that Respondent convene a team to discuss and determine compensatory education for the Student—a remedy that a Hearing Officer cannot remand to a group that includes representatives of Respondent. *See, Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Accordingly, the undersigned struck both of these requests for relief.

ordering that Petitioner may bring a new claim for specific compensatory education following completion of that evaluation; and

(h) any other relief the Hearing Officer deems appropriate.

VI. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VII. CREDIBILITY

SEC

The undersigned found SEC entirely credible. When he did not recall a conversation or event, he stated that he did not recall. When the undersigned questioned him as to whether Respondent always implemented the existing IEP of a child transferring from another Local Educational Agency (“LEA”) during the period before Respondent convened an IEP Team to review and revise the child’s IEP, SEC admitted that Respondent did not always do so. In short, SEC was candid, straightforward, and entirely consistent in his testimony.

Clinical Director

Clinical Director was equally credible. Her testimony was entirely consistent. She candidly admitted on cross-examination that she had not formally observed the Student in his classroom, had not participated in any meetings for the Student, had not discussed him with Charter School or DCPS School teachers or staff, and that she was not aware of the grade levels of all of the students in the Student's classroom. She acknowledged that the Student was experiencing academic difficulties in math, and behavioral/disciplinary problems including time outs three times per week and several suspensions for "punching" staff and a peer. In short, Clinical Director's testimony was believable.

Paralegal/Educational Advocate

Paralegal/Educational Advocate also was entirely credible. She acknowledged that her recommendations for compensatory education were based entirely upon information she received from Petitioner and the Student regarding the services he received or did not receive at DCPS School and that she did not know what services he actually received.

Petitioner

Petitioner was not at all credible, whether she deliberately prevaricated under oath or her memory is totally unreliable.

Petitioner's testimony was at times irrational (*e.g.*, she testified that the Student was supposed to receive 10 to 20 hours of counseling *per day*). When she testified nonsensically, her counsel sometimes corrected her (*e.g.*, she testified *several times* that

the Student was receiving numerous phone calls from DCPS School about his behavior, after which her counsel asked her whether it was she, rather than the Student, who received those calls, and she then testified that it was she who received the calls).

Petitioner cited dates of events with abandon (*e.g.*, one time testifying that the Student started at Non-Public School on December 18, 2013, another time testifying that it was in November 2013; one time testifying that the Student attended DCPS School every school day in November 2013 except the three days that he visited Non-Public School, another time testifying that SEC told her in November 2013 that the Student's attendance at DCPS School was bad).

More significant than these misstatements and inconsistencies, which could be attributed to nervousness at being a witness, most of Petitioner's testimony was irreconcilable with the testimony of the other witnesses. For example, Petitioner claimed to have met with SEC during the first week of SY 2013-2014, on or about August 22, 2013, to discuss enrolling the Student at DCPS School (his neighborhood school). Petitioner testified that SEC told her he would "get back" to her about whether the Student could attend, that there was no discussion of whether the Student would have an aide, and that she never would have agreed to elimination of the dedicated aide that was prescribed in the Student's most recent IEP from Charter School. However, SEC testified that he first met with Petitioner on or about September 6, 2013, in the presence of the DCPS School principal, at which time he informed Petitioner that the Student could attend DCPS School, in a special behavior support classroom with six other students, a teacher and one aide for the classroom; and that Petitioner expressed no disagreement.

Petitioner flatly denied having participated in any IEP Team meeting while the Student attended DCPS School, despite the contrary testimony of SEC and Respondent's documentary evidence that she participated in such a meeting on October 1, 2013, by telephone. SEC testified that Petitioner participated in the conversation, including stating that the Student did not require transportation. SEC also testified as to what the other participants stated at the meeting. In conflict with that testimony, Petitioner stated that she had a telephone conversation with SEC but there was no one else on the call.

Petitioner testified that she never saw a DCPS School IEP for the Student, whereas SEC testified that he sent a copy of the October 1, 2013 IEP to her via the Student and another copy via a home visit by the school social worker.

Petitioner testified that the Student received no behavioral support services (*i.e.* counseling) at DCPS School, while SEC testified that he knew the Student received counseling because he had weekly meetings with the provider of the counseling services and he saw the service provider escorting the Student to counseling sessions. Respondent also introduced documentary evidence of the counseling sessions ("service trackers").

To believe Petitioner, the undersigned would have to find that SEC lied repeatedly under oath and that Respondent fabricated the notes of the IEP Team meeting, the Prior Written Notice ("PWN") sent after the meeting, and the "service trackers" that documented both the Student's counseling sessions and his absences starting in mid-November 2013 when he was reported to be attending Non-Public School.

Because SEC was entirely credible and there is no evidence whatsoever corroborating Petitioner's testimony, the undersigned has disregarded Petitioner's

testimony entirely when it conflicted with documentary evidence or the testimony of other witnesses.

VIII. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a male of Current Age. R-3-1.⁵
2. The Student resides in the District of Columbia. Testimony of Petitioner.
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with Multiple Disabilities. R-3-1.

The May 31, 2011 Eligibility Meeting

4. On May 31, 2011, the Student was evaluated and determined to be eligible for special education under IDEA. R-3-2.
5. The Student has not been reevaluated since May 31, 2011 (Testimony of Petitioner, testimony of SEC) and Respondent made no effort to reevaluate the Student⁶ (Testimony of SEC).

⁵ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

⁶ SEC testified that once the Student was withdrawn from DCPS School, he no longer had access to the Student's records. While Respondent's systems and procedures may have precluded SEC's access to the Student's data, that is not an excuse for Respondent to fail to meet its obligations to a child with a disability residing in the District of Columbia. See, Section IX, *infra*.

The Student's IEP in Effect When He Began Attending DCPS School

6. The Student transferred from Charter School, located in the District of Columbia (P-7-1) to DCPS School on September 13, 2013 (R-7-1).

7. The Student's last IEP at Charter School, dated May 9, 2013, provided ten hours per week of specialized instruction and 60 minutes per week of behavioral support services, all in the outside of general education setting, and a dedicated aide. P-7-6.

The Student's Matriculation at DCPS School

8. Petitioner met with SEC and the Principal of DCPS School on or about September 6, 2013. Testimony of SEC.

9. At that meeting, Petitioner stated that the Student could no longer attend Charter School due to his acts of violence there. *Id.*

10. SEC informed Petitioner that the Student could be enrolled in DCPS School and would be placed in a behavior support classroom with six other students, a teacher and an aide, where he would receive 20 hours per week of specialized instruction and would be separated from the general education setting that may have contributed to his behavior problems at Charter School. *Id.*

11. SEC informed Petitioner that after the Student had attended DCPS School for 30 days, his IEP would be reviewed and adjusted. *Id.*

12. Petitioner expressed no disagreement with the Student attending the behavior support classroom. *Id.*

13. Petitioner enrolled the Student at DCPS School on September 13, 2013. *Id.*

14. The Student was placed in a behavior support classroom with six other students, a teacher and an aide, and was provided 20 hours per week of specialized instruction in the outside of general education setting. *Id.*

15. Petitioner expressed no objection to this placement. *Id.*

16. Based upon the entire record, the undersigned finds that Petitioner accepted the placement described in Findings of Fact 10 and 14 *supra*, including the increase in hours of specialized instruction in the outside of general education setting and the elimination of the dedicated aide.

The October 1, 2013 IEP Team Meeting

17. On October 1, 2013, the Student's IEP Team met, with Petitioner in attendance by telephone and developed an IEP for the Student. R-3.

18. The Team discussed the Student's lack of success at Charter School where his IEP provided 10 hours per week of specialized instruction, and the Team determined to increase the hours of specialized instruction to the 20 hours per week that he was already receiving at DCPS School, which would limit his exposure to the general education environment that may have contributed to his behavior problems at Charter School.

Testimony of SEC.

19. The Team determined not to change the Student's hours of behavioral support services, *i.e.* counseling. *Id.*

20. The October 1, 2013 IEP prescribed 20 hours per week of specialized instruction and 240 minutes per month⁷ of behavioral support services (*i.e.*, counseling), all in the outside of general education setting. R-3-9.

21. The IEP Team discussed the fact that the Student was one of seven children in his classroom with a teacher and one aide, and that the Student would not have a dedicated aide. Testimony of SEC.

22. Petitioner stated to the Team that the Student did not require transportation. *Id.*

23. The Student's teacher explained how she would be instructing the Student, and the school social worker described the services she would be providing. *Id.*

24. Petitioner did not disagree with the Team on any of the matters discussed. *Id.*

25. Based upon all of the record evidence, the undersigned finds that Petitioner agreed with the decisions made by the IEP Team at the October 1, 2013 meeting.

The October 1, 2013 PWN and IEP

26. On or about October 1, 2013,⁸ Respondent issued a PWN proposing to increase the Student's hours of specialized instruction in the outside of general education setting in his IEP from 10 per week to 20 per week, and to implement the revised IEP at DCPS School. R-2.

⁷ Charter School expressed the counseling services in hours per week; DCPS School expressed the counseling services in minutes per month. Due to the fact that a month has slightly more than four weeks, 240 minutes per month is slightly less than one hour per week. The undersigned finds that the difference is not material.

⁸ SEC testified that he prepared this document on October 1, 2013. He did not know why the document bears the date October 3, 2013. The undersigned does not find the discrepancy to have any significance.

27. The PWN did not state that the Student would no longer have a dedicated aide. *Id.*

28. The Student's October 1, 2013 IEP states that he does not require the support of a dedicated aide. R-3-9.

29. The Student's October 1, 2013 IEP states that the "School/Site" is DCPS School. R-3-1.

30. The PWN stated that the "School/Site" was DCPS School and that "[t]he IEP Team determined that the current IEP developed can be implemented at [DCPS School]. The parent has no concerns with location of services." R-2.

31. Based upon all of the record evidence, the undersigned finds that Petitioner agreed with the October 1, 2013 IEP, including the elimination of the dedicated aide, and the implementation of the implementation of the October 1, 2013 IEP at DCPS School.

32. Based upon all of the record evidence, the undersigned finds that the Student's October 1, 2013 IEP is the most recent agreed educational placement of the Student.

Behavioral Support Services Provided by Respondent to the Student

33. On September 17, 2013, the Student received 60 minutes of psycho-social counseling. R-6-6.

34. On September 25, 2013, the Student received 60 minutes of psycho-social counseling. *Id.*

35. Thus, from his matriculation at DCPS School on September 13, 2013 through the end of September 2013, the Student received 60 minutes per week of behavioral support services in the form of psycho-social counseling.

36. On October 2, 2013, the Student received 60 minutes of psycho-social counseling. R-6-4.

37. The Student missed counseling sessions on October 4 and 9, 2013, due to suspensions. *Id.*

38. On October 16, 2013, the Student received 60 minutes of psycho-social counseling. *Id.*

39. On October 22, 2013, the Student received 60 minutes of psycho-social counseling. R-6-4 and 5.

40. On October 29, 2013, the Student received 60 minutes of psycho-social counseling. R-6-5.

41. Thus, during October 2013, the Student received 240 minutes of behavioral support services in the form of psycho-social counseling.

42. On November 6, 2013, the Student received 60 minutes of psycho-social counseling. R-6-2.

43. Beginning on or about November 12, 2013, the Student was absent from DCPS School because he was attending Non-Public School (Testimony of Clinical Director that the Student began attending Non-Public School “mid-November”), and he therefore was unavailable for behavioral support services (R-6-1 and -2).

44. The undersigned finds that the Student’s failure to receive his prescribed 240 minutes per month of counseling after November 6, 2013 was due to his absence from DCPS School that resulted from Petitioner’s unilateral placement of the Student at Non-Public School.

Dedicated Aide

45. From September 13 through 30, 2013, DCPS School did not provide the Student a dedicated aide as specified in the Student's May 9, 2013 IEP. Testimony of SEC.

46. DCPS School officials believed that the Student did not require a dedicated aide there because he was in a small classroom (six other students) with a teacher and an aide, *i.e.*, a low student-to-adult ratio. *Id.*

47. Non-Public School has provided the Student a dedicated aide. Testimony of Clinical Director.

48. The Student's relationship with his dedicated aide at Non-Public School has been problematic, including an incident when the Student "punched" the aide. *Id.*

49. It has taken some time for the Student to develop a successful working relationship with his aide at Non-Public School. *Id.*

50. Based upon the limited usefulness of a dedicated aide to the Student, at least at the beginning of the student-aide relationship (*see*, Findings of Fact 48 and 49 *supra*), the undersigned finds that the lack of a dedicated aide for the two-week period in September 2013 that the Student attended DCPS School before development of his IEP on or about October 1, 2013, was not a material failure to implement his May 9, 2013 IEP.

Petitioner's Failure to Raise Concerns with DCPS School

51. Prior to placing the Student at Non-Public School in mid-November 2013 (*see* Finding of Fact 43 *supra*), Petitioner never expressed any concerns to Respondent about

DCPS School as the Student's LOS, about the classroom in which he was placed, or about the services he received at DCPS School (Testimony of Petitioner).

52. Petitioner did not attend parent-teacher conferences at DCPS School or request any meetings with the Student's teachers at DCPS School. *Id.*

53. Petitioner did not request any IEP Team meetings at DCPS School. *Id.*

Petitioner's Position on the Student Attending a District of Columbia Public School

54. Petitioner does not want the Student back in a District of Columbia Public School. R-1-3.

Compensatory Education

55. Paralegal/Educational Advocate developed Petitioner's Proposed Compensatory Education Plan (P-5) (the "Plan"). Testimony of Paralegal/Educational Advocate.

56. The Plan assumes that the Student received no instruction or other services for three months at DCPS School. *Id.*

57. In fact, the Student attended DCPS School for only two months, from September 13, 2013 (Testimony of SEC) to mid-November 2013 (Testimony of Clinical Director), and during that time he received 20 hours per week of specialized instruction in the outside of general education setting (Testimony of SEC) as well as an hour per week of behavioral support services, *i.e.*, counseling (R-6).

58. On cross-examination, Paralegal/Educational Advocate acknowledged that she did not know what specialized instruction or other services the Student received.

Testimony of Paralegal/Educational Advocate.

59. Neither the Plan nor the testimony of Paralegal/Educational Advocate identified any specific educational deficits resulting from the Student's alleged loss of FAPE or the specific compensatory measures needed to best correct those deficits.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended “(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C. §1400(d)(1); *accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a FAPE. FAPE means:
special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

Procedural Violations

3. A parent may file a DPC over a procedural violation of IDEA by an LEA.

However, a procedural violation does not necessarily equate to a denial of FAPE. Rather, a Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

20 U.S.C. §1414(f)(3)(E)(ii). *See also*, 34 C.F.R. §300.513(a); *accord*, *Lesesne v.*

District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006); *but see*, *G.G. v.*

District of Columbia, 924 F. Supp. 2d 273 (D.D.C. 2013).

Reevaluation

4. Unless the parent and the LEA agree that a reevaluation is unnecessary, a reevaluation of a child with a disability must be conducted at least once every three years, or more frequently if conditions warrant reevaluation, if the child's parent or teacher

requests a reevaluation, or before determining that a child is no longer a child with a disability; but no more frequently than once a year unless the parent and the LEA agree otherwise. 20 U.S.C. §1414(a)(2); 34 C.F.R. §300.303; DCMR §5-E3005.7.

5. The statutory and regulatory provisions cited in Conclusion of Law 4 *supra* do not contain an exception for a child who is attending a non-public school, even based upon unilateral parental placement when FAPE is not at issue. *Id.*

6. In the instant case, the Student was evaluated on May 31, 2011 (Finding of Fact 4); accordingly, even in the absence of any request for reevaluation, he should have been reevaluated by May 31, 2014.

7. Respondent's failure timely to reevaluate the Student is a violation of IDEA. However, because the reevaluation was due near the end of SY 2013-2014, there has not yet been any adverse impact upon the Student. Accordingly, the failure timely to reevaluate the Student is a procedural violation of IDEA rather than a denial of FAPE.⁹

IEP For Student Who Transfers Between LEAs During a School Year

8. In the case of a child with a disability who transfers LEAs within the District of Columbia within the same academic year, who enrolls in a new school, and who had an IEP that was in effect, the LEA of the new school "shall provide such child with a [FAPE], including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the [LEA] adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law." 20 U.S.C. §1414(d)(2)(C)(i)(I); *accord*, 34 C.F.R. §300.323(e).

⁹ The Order in Section X *infra* will ensure that the reevaluation is conducted expeditiously to avoid any adverse impact upon the Student for SY 2014-2015.

9. In the instant case, the Student transferred LEAs within the District of Columbia on September 13, 2013, *i.e.*, within an academic year. Finding of Fact 6. Accordingly, Respondent was required to provide services comparable to those described in the May 9, 2013 Charter School IEP in consultation with Petitioner until such time as Respondent adopted that IEP or developed, adopted and implemented a new IEP.

Failure to Implement IEP

10. If an LEA fails to implement an IEP fully, the failure constitutes a denial of FAPE only if the failure is “material.” *See, e.g., Banks v. District of Columbia*, 720 F. Supp. 2d 83 (D.D.C. 2010).

11. In the instant case, Respondent provided all of the counseling services required by the Student’s IEP. Findings of Fact 33 through 42.

12. Although Respondent did not provide the dedicated aide required by the Student’s May 9, 2013 Charter School IEP (Finding of Fact 45), and Respondent was required to provide services comparable to those required by the May 9, 2013 IEP until Respondent adopted the October 1, 2013 IEP (Conclusion of Law 9), this failure was not material (Finding of Fact 50), was not a denial of FAPE, and warrants no remedy.

13. The October 1, 2013 IEP, with which Petitioner agreed (Finding of Fact 25) did not require a dedicated aide. Therefore, the failure to provide a dedicated aide after October 1, 2013 was not a denial of FAPE or a procedural violation of IDEA.

Authority of Hearing Officer to Order Tuition Reimbursement and/or Prospective Placement in Private School

14. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) (“*Reid*”). That relief may include compensatory award of tuition reimbursement or prospective services. *Id.* In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) (“*Branham*”).

15. The IDEA provides that an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the agency made a FAPE available to the child and the parents elected to place the child in such private school or facility. 20 U.S.C. §1412(a)(10)(C)(i); *accord*, DCMR §5-E3018.1.

16. As noted by the U.S. Court of Appeals for the District of Columbia Circuit:

If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.

Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir. 1991) (“*Jenkins*”) (internal citations omitted); *see also*, *Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) (“Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent’s desires.”) and *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (“Thus, proof that loving parents can

craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”).

17. On the other hand, “a court or a hearing officer may require the agency to reimburse the parents for the cost of . . . enrollment [in a private school] if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. §300.148(c); *see also*, DCMR §5-E3018.3 and *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985) (“*Burlington*”). Moreover, “equitable considerations are relevant in fashioning relief.” *Id.* at 374.

18. In the instant case, the undersigned concludes that Respondent did make a FAPE available to the Student, because (a) the failure to provide a dedicated aide from September 13 to October 1, 2013 was not a material failure to provide services comparable to those required by his May 9, 2013 Charter School IEP (Finding of Fact 50); (b) the failure timely to reevaluate the Student has not caused him any educational harm (Conclusion of Law 7); (c) Petitioner agreed with the IEP developed on October 1, 2013 (Finding of Fact 25) and (d) the adequacy of the Student’s October 1, 2013 IEP is not an issue in this case (*See*, Section IV, *supra*).

19. Accordingly, Respondent is not required to pay for the Student’s private placement. *N.T. v. District of Columbia*, 839 F. Supp. 2d 29 (D.D.C. 2012), citing *Jenkins* at 305 and *Burlington* at 373-74.

Relevance of the Parent’s Motive in Unilaterally Placing the Student:

20. If an LEA denies a child a FAPE, the child’s parent’s intent in enrolling the Student at a non-public school is relevant to the equity of awarding tuition reimbursement as a remedy. *See, K.G. ex rel. C.G. v. Sheehan*, 56 IDELR 17 (D.R.I. 2010) (“It is significant that there is no evidence that MM’s parents would have accepted any FAPE offered by the District that did not include reimbursement for the Lovaas program. As we have noted, the District is not obligated by the IDEA to provide a disabled child with an optimal education; it is only obliged to provide a FAPE.”).

21. In the instant case, Respondent has not denied the Student a FAPE. However, even if Respondent had denied the Student a FAPE, Petitioner’s unwillingness to have the Student return to a public school (Finding of Fact 54) would defeat her claim for tuition reimbursement.

Compensatory Education

22. Even if Respondent’s failure to provide a dedicated aide for two weeks in September 2013 had denied the Student a FAPE, Petitioner’s proposed compensatory education would be inappropriate.

23. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid* at 521-24.

24. Relief for a denial of FAPE may include compensatory award of prospective services:

When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order

compensatory education, i.e., replacement of educational services the child should have received in the first place.

Id.

25. In all cases, an order of relief must be evidence-based. *Branham*. Educational programs, including compensatory education, must be qualitative, fact-intensive, and “above all tailored to the unique needs of the disabled student.” *Id.*

26. Mechanical calculation of the number of hours of compensatory education (a “cookie-cutter approach”) is not permissible. *Reid*. Rather, compensatory awards “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” *Id.* Awards compensating past violations must “rely on individual assessments.” *Id.*

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

Id.

27. Formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an “individually-tailored assessment”. *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (citing *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008)).

28. The Hearing Officer must base a compensatory education award on evidence regarding the student’s “specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.” *Id.*

29. In every case, “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.*

30. When, as in the instant case, Petitioner’s request for compensatory education is “untethered” to the student’s alleged “educational deficit or to the necessary and reasonable education reasonably calculated to elevate [the student] to the approximate position he would have enjoyed had he not suffered the denial of FAPE,” the Hearing Officer cannot award compensatory education, even if the student was denied a FAPE. *Gill v. District of Columbia*, 751 F. Supp. 2d 104 (D.D.C. 2010).

31. In the instant case, at the PHC and in the PHO, the undersigned advised Petitioner of the need to introduce evidence supporting the requested compensatory education, yet the record remains devoid of evidence that would allow the undersigned to craft an order of compensatory education that would be “specifically and individually tailored to the student to compensate the student for the educational lapse.” *Id.*

32. In these circumstances, even if Respondent had denied the Student a FAPE, the undersigned would conclude that no compensatory education award should be granted. *Phillips v. District of Columbia*, 736 F. Supp. 2d 240 (2010).

Summary

33. From September 8, 2013 through May 30, 2014 Respondent did not deny the Student a FAPE by failing to assess and reevaluate him in all areas of suspected disability because no request for assessment or reevaluation had been made and three years had not elapsed since the Student’s May 31, 2011 evaluation.

34. Since May 31, 2014, Respondent has not denied the Student a FAPE by failing to assess or reevaluate him in all areas of suspected disability because the assessment and/or reevaluation would not have affected his IEP for the remaining weeks of SY 2013-2014; however Respondent's failure to reevaluate the Student since May 31, 2014 is a procedural violation of IDEA that could result in a future denial of FAPE if not remedied.

35. Since September 8, 2013, Respondent has not violated IDEA's procedural requirements or denied the Student a FAPE by failing to develop an IEP for him, including placement, because (a) the Student did not begin attending a DCPS school until September 13, 2013, and (b) Respondent timely developed an IEP for the Student, including placement, on October 1, 2013, approximately two weeks after he transferred from Charter School to DCPS School.

36. Since September 8, 2013, Respondent has not violated IDEA's procedural requirements or denied the Student a FAPE by failing to determine an LOS for him, because (a) the Student did not begin attending a DCPS school until September 13, 2013, and (b) Respondent timely determined on October 1, 2013 that DCPS School was his LOS.

37. From September 8 through 30, 2013, Respondent did not deny the Student a FAPE by failing to provide the dedicated aide prescribed in the IEP from Charter School because (a) the Student did not begin attending a DCPS school until September 13, 2013 and (b) the failure to provide the dedicated aide from September 13 to October 1, 2013 was not a material deviation from the Student's May 9, 2013 IEP.

38. From October 1 through November 11, 2013, Respondent did not deny the Student a FAPE by failing to provide the dedicated aide prescribed in the IEP from Charter School because that IEP had been revised with Petitioner's agreement, and the Student no longer was entitled to a dedicated aide under the October 1, 2013 IEP.

39. From September 13 through 30, 2013, Respondent provided the counseling prescribed in the Student's May 9, 2013 IEP.

40. From October 1 through November 11, 2013, Respondent provided the counseling prescribed in the October 1, 2013 IEP, which was substantially the same amount of counseling as in the Student's May 9, 2013 IEP.

41. From November 12 through December 18, 2013, and continuing, Respondent has not denied the Student a FAPE in any manner because the Student has been attending Non-Public School as a result of a unilateral parental placement that was not based upon a denial of FAPE.

X. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. No later than August 4, 2014, Respondent shall send to Petitioner, via U.S. mail to her last known address, whatever consent forms Respondent requires to reevaluate the Student, indicating on such forms or a cover letter the name of the DCPS staff member to whom the signed forms should be returned, and that person's mailing address, facsimile number and email address.

2. No later than August 8, 2014, Petitioner shall return the signed consent forms to Respondent.

3. No later than August 12, 2014, Respondent shall either (a) commence to conduct a comprehensive psychological evaluation of the Student with a report completed and sent to Petitioner no later than August 29, 2014 via U.S. mail to her last known address; or (b) issue to Petitioner via U.S. mail to her last known address an Independent Educational Evaluation (“IEE”) letter authorizing her to obtain a comprehensive psychological evaluation of the Student, in which case Petitioner shall make reasonable efforts to have such evaluation completed and a copy of the report sent no later than August 29, 2014 directly to the DCPS staff member to whom the signed consent forms were sent.

4. No later than September 8, 2014, Respondent shall convene a meeting of the Student’s Individualized Education Program (“IEP”) Team or Multidisciplinary Team (“MDT”), with all necessary members, including Petitioner, at whatever school the Student then is attending. The Team shall (a) review the report of the comprehensive psychological evaluation and any other evaluations and assessments that Respondent has conducted or that Petitioner or Petitioner’s representatives have provided to Respondent; (b) review any other updated information regarding the Student's performance, behavior, attendance and disabilities; (c) review and revise, as appropriate, the Student's October 1, 2013 IEP; (d) discuss and determine an appropriate educational placement and location of services that can meet the Student's needs; and (e) discuss and determine whether the Student requires a Functional Behavioral Assessment and/or a Behavior Intervention Plan.

5. All written communications from Respondent to Petitioner concerning the above matters, including the consent forms, IEE letter (if one is issued), and report of the comprehensive psychological evaluation (if it is conducted by Respondent rather than by IEE) shall include copies to Petitioner's counsel by facsimile or email.

6. Any delay caused by Petitioner, the Student, their IEE provider, or their representatives (*e.g.*, absence or failure to attend a meeting, delay in submitting the report of the IEE, failure to respond to scheduling requests within one business day, or failure to make the Student available for testing on date(s) proposed by the evaluator) shall extend Respondent's deadlines under this Order by the same number of days.

7. Petitioner's other requests for relief are DENIED.

IT IS SO ORDERED.

Dated this 28th day of July, 2014.



Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).