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

Date Issued: November 21, 2012

Student,[1] by and through the
Petitioner,

Hearing Officer: Michael Lazan

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 NOV 23 AM 9:55

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") received by Respondent on September 7, 2012. This IHO was appointed to hear this matter shortly thereafter, on September 11, 2012. Respondent filed a Response to the Complaint on September 21, 2012, denying the Complaint and indicating that the Complaint was insufficient. This IHO then issued a written order dated September 26, 2012, determining that the Complaint was sufficient.

On September 24, 2012, a resolution meeting was scheduled. Petitioner did not appear. Petitioner contends that she did not appear because of an emergency that she had to attend to. The resolution period ended on October 7, 2012. The HOD was due on November 21, 2012.

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

A Prehearing Conference was held on October 11, 2012. A Prehearing Conference Summary and Order was issued on October 16, 2012. A Revised Prehearing Conference Summary and Order was issued on October 17, 2012.

A hearing date set for October 28, 2012 was cancelled due to inclement weather. Hearing dates were held on November 1, 2012 and November 14, 2012. These were closed hearings.

Petitioner entered into evidence exhibits 1-29, 31-38; Respondent entered into evidence exhibits 1-8. Petitioner presented as witnesses: Petitioner; Educational Advocate Mia Long; Natasha Nelson, a psychologist. Respondent presented as witnesses: Natasha Cannon, a case manager and special education teacher; Rasheeda Hinckson, a special education coordinator; Meredith Flynn, an IEP coordinator; Katrina Foster, a special education coordinator.

After the Petitioner's presentation, on November 1, 2012, Respondent orally moved to dismiss. This oral request was denied on the record by this Hearing Officer. At the end of the hearing day on November 14, 2012, the parties presented oral closing arguments.

JURISDICTION

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

BACKGROUND

The Student is eligible for services as a student with a specific learning disability. The Due Process Complaint contains these allegations: 1) District

of Columbia Public Schools (DCPS) denied the Student a FAPE when they failed to conduct an occupational therapy evaluation and/or an assistive technology assessment for this student, as requested by the parent in July, 2011, February, 2012, and March, 2012 and/or fund an independent psychological evaluation for the student; 2) District of Columbia Public Schools (DCPS) denied the student a FAPE when they failed to develop an appropriate IEP on or about May 16, 2011; 3) District of Columbia Public Schools (DCPS) denied the student a FAPE when they failed to develop an appropriate IEP on or about October 26, 2011; 4) District of Columbia Public Schools (DCPS) denied the Student a FAPE when they failed to fully implement the student's October 26, 2012 IEP by failing to provide the student with four (4) hours of pull-out services per week between October 26, 2011 and the end of the 2011/2012 school year; 5) District of Columbia Public Schools (DCPS) denied the student a FAPE when they failed to provide the student with an appropriate placement and failed to provide an appropriate location of service for the 2012/2013 school year.

As relief, Petitioner seeks: Petitioner seeks a) a comprehensive psychological assessment, by Dr. Natasha Nelson (if available); b) an occupational therapy assessment, by Connoboy and Associates (if available); c) a reconvened IEP meeting; d) a new IEP with reading goals, math goals, speech and language therapy for 30 minutes a week, e) occupational therapy as indicated by the occupational therapy assessment; f) not less than 15 hours of special education services outside the general education setting; g) that the Student be provided with an educational placement at High Road school; h) that compensatory education be provided in the form of individualized tutoring in reading and math and individualized speech and language therapy services.

ISSUES

The issues to be determined are as follows:

1. Did DCPS deny the Student a FAPE by failing to assess the Student in all areas of suspected disability when it failed to: a) conduct an occupational therapy assessment of the Student in connection to the IEP meeting dated May 16, 2011? and b) authorize an independent psychological assessment of the Student in connection to the IEP meeting dated May 16, 2011?

2. Did DCPS deny the Student a FAPE by failing to assess the Student in all areas of suspected disability when it failed to: a) conduct an occupational therapy assessment of the Student in connection to the IEP meeting dated October 26, 2011? and b) authorize an independent psychological assessment of the Student in connection to the IEP meeting dated October 26, 2011?

3. Did DCPS deny the Student a FAPE by offering the Student an IEP through the meeting dated May 16, 2011 which: a) reduced special education services within the general education setting from 15 hours of services to 5 hours of services; b) failed to provide reading, math, and social/emotional goals; c) failed to provide behavioral support services; and d) failed to provide speech and language therapy?

4. Did DCPS deny the Student a FAPE by offering the Student an IEP through the meeting dated October 26, 2011 which: a) provided special education services of 4 hours per month of services outside the general education setting and 2 hours per week in the general education setting; and b) failed to provide reading and math goals?

5. Did DCPS deny the Student a FAPE by failing to implement the IEP reflecting the meeting dated October 26, 2011 by failing to provide special education services for 4 hours a

month outside the general education setting and 2 hours per week in the general education setting?

6. Did DCPS deny the Student a FAPE by failing to implement the IEP reflecting the meeting dated October 26, 2011 by failing to designate an educational placement for the Student for the 2012-2013 school year?

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:

2. The Student is currently eligible for services as a student with a specific learning disability. (P-2-2)

3. The Student lives with her mother, brothers, uncle and god-sister. She has never had any contact with her father. (P-19-1)

4. The Student has issues with reading comprehension, in particular relating to higher order texts. (Testimony of Long; P-4-1-10)

5. The Student requires scaffolding in math to understand the material in class. (Testimony of Cannon)

6. The Student's difficulties with attendance relate to her difficulty in understanding the work. (Testimony of parent; P-21-4; P-6-8)

7. The Student has benefitted from individual instruction when she has had the opportunity to receive it. (R-8-162; P-19-5)

8. In February, 2009, when the Student was in fourth grade, the Student tested at the third grade level in broad reading and at the second grade level in math calculations on the

Woodcock-Johnson III. Reading passage comprehension was tested at the 2.4 grade level equivalent. (P-20-3)

9. During the 2010-2011 school year, the Student attended School A. The Student had more than ten unexcused absences during this school year. The Student was also tardy for much of the year. These absences and tardies impacted on her academic work and limited her ability to progress. (R-8-61-69, 152, 156, 160; Testimony of Flynn)

10. At the start of 2011, the Student has difficulty with math procedures, including fraction operations and converting between mixed numbers. (P-10-1)

11. At an IEP meeting on January 15, 2011, difficulties were noted in the Student's math ability in relation to basic calculation, number sense, understanding abstract mathematical concepts. In reading, the Student performed with difficulty in phonemic awareness and higher order thinking. In terms of speech and language, the Student's performance reflected delays in receptive language. In terms of emotional, social and behavioral development, the Student had difficulty with emotional regulation and coping skills. (P-4-1-10)

12. At about this time, the Student performed in mathematics on the third grade level and performed in reading on the fourth grade level. (P-4-3-4)

13. At about this time, the Student scored in the basic range in math on the DC-BAS and below basic range in reading on the DC-BAS. (P-4-3-4)

14. The January 15, 2011 IEP recommended goals in reading, writing, math, speech and language, and social and emotional issues. The Student required "self-calming" techniques and needed to work on verbalizing feelings so that she could function in the school environment. (P-4-6)

15. Per the January 15, 2011 IEP, the Student required behavioral support services for one hour per week. (P-4-8)

16. Per the January 15, 2011 IEP, the Student required 15 hours of specialized instruction in a general education setting with speech and language therapy, 30 minutes per week. (P-4-7)

17. A speech and language therapy screening on March 17, 2011 by DCPS evaluator Judith Edghill, M.S., CCC-SLP/A, indicated that the Student did not have a speech and language impairment that impacted on her educational performance. The Student's higher level language skills were found to be in the average range. Spoken language, vocabulary, articulation, voice and fluency were average. (P-10-6, P-21-1-7)

18. The speech evaluation recommended that the MDT discuss concerns relating to the Student's attendance and that appropriate procedures strategies should be established to address attendance issues. (P-21-4)

19. On April 13, 2011, the Student was tested to have a full scale IQ score of 79. (P-6-3)

20. On April 13, 2011, on the WIAT-III, the Student scored 92 in basic reading, 86 in mathematical expression. (P-6-3) In problem solving, the Student performed at the 3.4 grade level equivalent. (P-10-2) In reading comprehension, the Student tested at the 2.3 grade level equivalent. (P-10-2)

21. BASC-2 testing conducted on the same date. Three teachers of the Student were questioned. Behavior areas were deemed not severe enough to warrant intervention, but were to be "monitored closely." (P-19-4)

22. The BASC-2 should be administered to the parent and the student in addition to the teachers for it to be credible. (Testimony of Nelson)

23. The psychoeducational report of the DCPS examiner Carla Jones was issued on May 9, 2011. The examiner recommended that the Student work with individual attention in a small group setting or one-to-one setting for instruction. (P-19-5)

24. The examiner indicated that the Student would benefit from tutorial and/or remedial services to enhance her skills, specifically in written expression. (P-19-5)

25. Ms. Jones's testing reflected PSI "coding" scores which relating to fine motor functioning. (Testimony of Nelson)

26. The testing by Ms. Jones did not focus on reading comprehension. (Testimony of Nelson)

27. During the testing, the Student felt humiliated that she could not complete the essay portion of the test. The examiner then did not require her to complete the essay. (P-19-4)

28. Projective testing was not completed in connection to the evaluation by Carla Jones. (Testimony of Nelson)

29. Ms. Jones's testing did not examine the reasons behind the Student's truancy. (Testimony of Nelson)

30. At an IEP meeting on May 16, 2011, difficulties were again noted in math related to basic calculation, number sense, understanding abstract mathematical concepts. In reading, the Student was noted to have difficulty in terms of higher order thinking and struggled with difficult texts. In terms of emotional, social and behavioral development, the Student had deemed to have difficulty with emotional regulation and coping skills. (R-5-31-40)

31. Social and emotional goals developed on May 16, 2011 require that the Student understand core emotions, identify external and internal stimuli that are distracting during instruction, verbalize feelings using "I" statements, use self-calming technigues, and identify both positive and negative self-traits. (R-5-35-36)

32. At about this time, the Student performed in mathematics on the third grade level and performed in reading on the fourth grade level. (R-5-32-33)

33. In regard to math, the Student scored in the proficient range for algebra and data, but below the basic range for measurement. (R-5-32)

34. In regard to reading, the Student was able to accurately decode and define multisyllabic words. However, the Student struggled with overall text comprehension. (R-5-33)

35. The May 16, 2011 IEP contained goals in reading, writing, math, speech and language, and social and emotional issues. (R-5-31-40)

36. Per the May IEP, the Student required "self-calming" techniques and needed to work on verbalizing feelings so that she could function in the school environment. (R-5-36)

37. The Student not provided with behavioral support services or speech and language therapy as a result of this IEP. (R-5-31-40)

38. The Student was provided with 15 hours of specialized instruction in a general education setting as a result of this IEP. (R-5-37)

39. The Student failed sixth grade, and was promoted because of "social promotion." The Student was sorrowful about being retained and so the parties agreed to move her into the 7th grade. (Testimony of Hinckson)

40. The Student's final grades for 2010-2011 at School A included one C (Composition 6), three C- (Science 6, Math Problem Solving 6, History 6), one F

(comprehension 6). In Composition and History, the Student was "wonderful" to have in class when she attended. In Art, the Student showed good work and effort. In Technology, the Student did "great" work. (R-8-70)

41. On July 11, 2011, Petitioner asked Respondent for an occupational therapy evaluation and an independent speech evaluation. (P-33-1)

42. The Student moved to School B for the 2011-2012 year. The Student and Petitioner knew that the Student's performance had to be adequate for the Student to be able to continue at this school in future years. (Testimony of parent; Testimony of Cannon; Testimony of Hinckson)

43. The Student showed deficiencies in math during the start of the school year and required scaffolding to be able to understand and complete the work in the general education classroom. (Testimony of Cannon)

44. Slosson testing by Respondent on September 26, 2011 indicated that the Student was functioning on a 7.8 level level in oral reading. The Morrison McCall spelling assessment from the same date indicated that the Student was functioning on a 7.5 level. Brigance math assessment from the same date indicated that the Student was functioning on a 4.5 grade level equivalent. (Testimony of Cannon; P-6-3)

45. During the 2011-2012 school year, the Student had difficulty understanding some of the work she received. (Testimony of parent; P-7-2)

46. During the 2011-2012 school year, the Student had difficulty with talking too much in class, playing in class, hitting other students, being disruptive in class. (P-7-3; P-6-3)

47. The Student's attendance was poor at the start of the 2011-2012 school year, with the Student missing English and Math 36 times by October 26, 2011. The Student missed Health

8 times, Reading Strategies 12 times, Science 12 times, Spanish 16 times. The Student missed a total of 441 periods from August 25, 2011 through February 1, 2012.(P-7-3, P-16-1-7)

48. The parties had an IEP meeting on October 26, 2011. At this IEP meeting, the Student's Math teacher indicated that the Student had difficulty with computation and received a 44 grade on her first test. (P-7-2)

49. At the IEP meeting on October 26, 2011, Petitioner asked for a yellow school bus to pick the student up and take her to school. (P-7-3)

50. The October 26, 2011 IEP does not indicate difficulties in either math, reading, or speech and language.

51. The October 26, 2011 IEP indicated that reading fluency, comprehension and spelling were strengths. (P-6-3)

52. Goals related to written expression and social emotional issues. No goals were listed for reading, math, speech and language therapy. (P-6-3, 8)

53. The Student's social and emotional needs were indicated to relate to school attendance. (P-6-8)

54. Specialized instruction is recommended for the Student, 2 hours per week in the general education setting and 4 hours per month outside general education. (P-6-10)

55. Behavioral Support Services are recommended for one hour per week. (P-6-10)

56. Speech services were discontinued because of an assessment done on February 17, 2011. (P-7-4)

57. Petitioner agreed with the services recommended on this date. (P-7-5; Testimony of Hinckson)

58. After the IEP meeting, the Student's attendance continued to be poor. (P-8-1) The Student would often be late because she sought to travel to school with her cousins. (Testimony of Cannon)

59. The Student did not want to ride the yellow bus. There is a stigma with some children about riding the yellow bus. (Testimony of Hinckson)

60. Towards December, 2011, the Student began acting out and refusing to do work. (Testimony of Cannon)

61. After Christmas, 2011, attendance began to "spiral out of control." (Testimony of Hinckson)

62. At a meeting between the parties on January 25, 2012, Petitioner contended that the Student needed more support in class. The school representative indicated that the Student could do the work if she attended class. (P-8-2)

63. A speech and language assessment from Carolyn Ross dated April 21, 2012 examined the Student on measures such as the Receptive and Expressive One Word Picture Test, the CELF-4, and the Goldman-Fristoe Test of Articulation-2. The Receptive and Expressive One Word Picture Test and CELF-4 indicated mild deficits in speech and language and recommends speech and language therapy for thirty minutes a week. (P-18-5)

64. For the 2011-2012 school year, the Student was absent from homeroom 43 times. The Student received a D in Spanish Humanities Part A, an F in Test Taking Strategies, an A in Academic Support, and F in mathematics, a C in Science, a D in World History, a D in Health. In math and science for the first semester she was a "pleasure to have in class." (P-11-1, P-13-1) The Student was interested in going to a non-public school at this time. (Testimony of Hinckson)

65. During the 2011-2012 school year, the school staff called a truancy officer, called the parent, sent letters home to address attendance issues. (Testimony of Cannon)

66. In August, 2012, Petitioner tried to register the Student at School B for the upcoming school year but was told that the Student could not enroll in the school. (Testimony of parent)

67. At this time, Petitioner and the Student knew that they could have enrolled the Student in her home school, School C. (Testimony of Hinckson)

68. Petitioner never received any written or oral notice that the Student had been dismissed from School C or should have attended School D. (Testimony of Hinckson)

69. Petitioner was given a choice of schools at this time and chose School D. (Testimony of parent)

70. Petitioner did not want to enroll the Student in School C because there were a lot of fights at the school, gangs at the school. (Testimony of parent)

71. At School D, the Student has been absent excessively, and the attendance monitor has had to contact Child and Family services. (Testimony of Foster)

72. School D is not able to implement the IEP. School D is run with an inclusion model, with several classes co-taught with a general education teacher and a special education teacher. (Testimony of Foster)

73. On October 22, 2012, Respondent provided the Petitioner with authorizations to obtain 1) a comprehensive psychological evaluation; 2) an occupational therapy evaluation; 3) an assistive technology evaluation. (R-4-28)

74. This IHO found all witnesses credible except for the Petitioner, who I found partly credible, and Ms. Cannon, who I found partly credible. Petitioner's testimony was compromised

by her characterization of the Student having ADHD, where there is no such reference in the record. Ms. Cannon's testimony was compromised by her failure to explain that School B would likely not have been able to provide the Student with 15 hours of special education services per week.

CONCLUSIONS OF LAW

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

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

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with

the opportunity provided other children." Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

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

1. FAPE, May 16, 2011 IEP/Review.

Petitioner contends that the District denied the Student a FAPE in connection to the IEP dated May 16, 2011 and the corresponding review.

Petitioner contends that DCPS deny the Student a FAPE by failing to assess the Student in all areas of suspected disability when it failed to conduct an occupational therapy assessment of the Student and failed to authorize an independent psychological assessment of the Student.

Petitioner also contends that DCPS denied the Student a FAPE by offering the Student an IEP through the meeting dated May 16, 2011 which: a) reduced special education services within the general education setting from 15 hours of services to 5 hours of services; b) failed to provide reading, math, and social/emotional goals; c) failed to provide behavioral support services; and d) failed to provide speech and language therapy.

A significant problem for this Student is her difficulty with attendance and tardiness. DCPS contends that the difficulty with attendance and tardiness is a matter of the Student's choice and is not related to the Student's disability.

Respondent has an "affirmative duty" to address a Student's truancy. 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).

Courts and administrative bodies have held that District should assess the reasons behind a Student's truancy if the truancy can be linked to the disability. 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); 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).

I find that the Student's disability has a significant emotional component. The psychological assessment by DCPS indicated that the Student was so embarrassed by her writing skills that the examiner allowed her to not complete an essay during the assessment. The testimony indicates that the Student was upset about failing sixth grade and wanted to be promoted to fit in with her peers. The Student is embarrassed to travel on the yellow school bus because of the stigma it apparently has with some other students. All of the Student's IEPs have contained social and emotional goals, with the May 16, 2011 IEP specifically indicating that the Student needed to work on emotional regulation and coping skills. Indeed, DCPS's own speech evaluator concluded that the team discuss concerns relating to the Student's attendance and that appropriate procedures strategies should be established to address attendance issues.

Under the circumstances, Respondent had a duty to assess the nature and function of the Student's truancy. However, in connection to the May 16, 2011 review, there was no assessment of why the Student had been absent and tardy so many times at School A. Respondent did conduct a psychological assessment of the Student through the services of Carla Jones. However, this psychological assessment of the Student did not contain any review or analysis of the Student's attendance and tardiness issues. The assessment did include BASC-2 testing, which relates to social and emotional issues. However, there is nothing in the record to suggest that the BASC-2 is the appropriate measure to determine the reasons behind a Student's truancy. Moroever, the unrebutted testimony of Natasha Nelson indicated that the BASC-2 testing was faulty because it did not include a parent and Student interview. It should be noted that Ms. Jones was not called as a witness by Respondent.

Additionally, I agree with the Petitioner that the Student should have received behavioral support services in this IEP. The IEP contains social and emotional goals relating to coping and regulation. The goals require that the Student understand core emotions, identify external and internal stimuli that are distracting during instruction, verbalize feelings using "I" statements, use self-calming techniques, and identify both positive and negative self-traits. There is nothing in the IEP to explain who would work on these goals in the absence of a behavioral specialist, or to explain why the behavioral support services recommended just four months before were no longer necessary.

Petitioner's other arguments regarding the May 16, 2011 IEP and review are misplaced. Most of these arguments (relating to a reduction in hours, an elimination of math, reading and social/emotional goals) are premised on Petitioner's copy of the IEP, which is not the correct copy as established through the testimony of Meredith Flynn. I also do not credit Petitioner's

argument that an occupational therapy assessment was necessary in connection to this meeting. Petitioner did not call an occupational therapist as a witness to substantiate the need for an occupational therapy assessment at the time. Petitioner also did not explain why the lack of such occupational therapy assessment rose to the level of FAPE denial. Additionally, I do not credit Petitioner's argument that a speech and language therapy was necessary for this Student. In fact, a credible speech and language assessment had recently been conducted of the Student that determined that the Student did not need such therapy. There is no testimony in the record to indicate that this assessment was in any way inappropriate or that the IEP team had reason to doubt its conclusions at the time of the IEP meeting on May 16, 2011.

In sum, the lack of an assessment of the nature and function of the Student's truancy and tardiness, and the lack of appropriate behavioral intervention services, resulted in an IEP that was not reasonably calculated for this Student. Respondent denied the Student a FAPE on May 16, 2011 through to the effective date of the subsequent IEP, October 26, 2011.

2. FAPE, 10/26/11 IEP/Review.

Petitioner contends that Respondent denied the Student a FAPE in connection to the IEP dated October 26, 2011 and the corresponding review.

For the same reasons as the reason already stated and regarding the May 16, 2011, Petitioner contends that Respondent failed to assess the Student in all areas of suspected disability. Petitioner contends that Respondent failed to completely assess the Student's social and emotional functioning, and failed to assess the Student's occupational therapy needs.

Petitioner also contends that DCPS denied the Student a FAPE by offering the Student an IEP through the meeting dated May 16, 2011 which: a) reduced special education services within the general education setting from 15 hours of services to 2 hours of services, with 4

hours of services outside the general education setting; b) failed to provide reading and math goals.

For the same reasons as this IHO has articulated regarding the May 16, 2011 IEP, I agree that Respondent failed to assess the Student in regard to the Student's problems with absenteeism and tardiness. The record makes clear that the Student's problems with tardiness and absenteeism continued during the 2011-2012 school year. The Student's attendance was poor at the start of the 2011-2012 school year, with the Student missing English and Math 36 times by October 26, 2011. Respondent again suggests that this absenteeism was exclusively a function of the Student's choices, and argues that this choice relates to her relationship with her cousins and her family. However, again, the testimony and evidence point to the Student having significant social and emotional issues with respect to her education, including with coping and emotional regulation. Indeed, the October 26, 2011 IEP adds under "Emotional, Social, Behavioral Development" that there are problems with the Student's school attendance. However, again, the IEP team did not assess the nature and function of the Student's attendance issues except to assume that the attendance issues were a matter of the Student's choice. To this IHO, a comprehensive psychological assessment was and is in order to assess the Student's attendance and tardiness issues, as was requested by Petitioner previous to the date of the IEP.

With respect to the reduction in special education services from 15 hours per week to 2 hours per week inside the general education setting (with 4 hours per month outside the general education setting), I find that this decision was motivated by the fact that School B would not be able to accommodate the Student's needs. Testimony from Ms. Hinckson indicated that School B would likely not be able to accommodate the Student's previous mandate of 15 hours per week.

DCPS Examiner Carla Jones's April, 2011 testing indicated that the Student has significant deficits in math, solving problems at the 3.4 grade level equivalent though at the end of sixth grade. More recent testing by Ms. Cannon also shows the Student to be functioning about about three grade levels behind her actual grade level in math. As Ms. Cannon indicated during her testimony, the Student requires significant support and scaffolding to be able to manage in a general education math class. However, with only two hours of special education services in the classroom per week, and with significant deficits in writing to be addressed, the recommended program would effectively place the Student in a math class without any special education services. Further to this point, there are no math goals in the Student's IEP to provide a framework for special education instruction in math. It should be noted that the Student received a C- in sixth grade for math for 2010-2011 -- even with additional special education math support and math goals.

The same analysis holds for reading. The Student was deemed to "struggle with overall text comprehension" in the May 16, 2011 IEP. In May, 2011, Carla Jones of DCPS tested the Student to have a 2.3 grade level in reading comprehension on the WIAT-III. The Student then failed a class called "comprehension." While there is some informal testing to indicate that Student's reading levels are higher in some areas other than comprehension, I find that the Student requires requires additional assistance and scaffolding in a general education classroom to be able to understand higher order texts. With only two hours a week of special education services in the classroom, and with significant deficits to be addressed in writing, the recommended program would not provide the Student with the support she needs to be able to perform her reading work in the classroom. Further to this point, there are no reading goals on this IEP to provide a framework for instruction in the Student's deficit areas in reading.

In sum, the lack of an assessment of the nature and function of the Student's truancy and tardiness, the lack of sufficient special education services for math and reading, and the lack of goals for math and reading resulted in an IEP that was not reasonably calculated for this Student. Any "agreement" with Petitioner about this IEP does not provide a defense for Respondent. An LEA is obligated to provide FAPE to a child. The parent is not in a position to unilaterally assess whether what the district proposed is, in fact, FAPE. As a result, the District denied the Student a FAPE through its IEP dated October 26, 2011.

3. Failure to Implement the October 26, 2011 IEP.

"Failure to implement" claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 2012 WL 548173 (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).

Petitioner contends that the Respondent failed to implement the October 26, 2011 IEP, which provides for 4 hours a week of special education instruction outside the classroom and 2 hours of special education instruction in the classroom.

Petitioner only presents her own testimony in support of this claim. Petitioner indicated that the Student was "never pulled out of any class" and "never sat down with any teachers," but did not support this claim with any corroborating testimony or evidence. The Student did not testify to support this claim. Finally, Ms. Cannon convincingly denied this claim. Noting that

the burden of persuasion is on the Petitioner, I find that Petitioner has not carried her burden of showing that these contentions can amount to a finding of FAPE denial.

4. Failure to Designate an Educational Placement for 2012-2013.

Petitioner claims Respondent failed to designate an educational placement by the start of 2012-2013 school year. Petitioner testified that the Student went to School B in August, 2012 and was denied an opportunity to enroll. Respondent testified that it did not provide Petitioner or the Student with any notice that the Student could no longer enroll at School B prior to the start of the 2012-2013 school year. However, Respondent's witnesses convincingly testified that the Student knew she would be ineligible for 2012-2013 school year because of her poor performance in 2011-2012. Ms. Hinckson indicated that Petitioner should have known that the Student could have attended her home zoned school, School C, which could provide the services on the IEP. However, Petitioner did not want to enroll the Student at School C. Ultimately, Petitioner chose to enroll the Student in School D, even though this school could not provide the special education services on the Student's IEP.

Though Respondent should have provided the Student with a written notice of the Student's specific school placement for the 2012-2013 school year, such a failure does not rise to the level of a FAPE deprivation. Petitioner knew that the Student could have been serviced at School C for the 2012-2013 school year. This claim is dismissed.

5. Relief.

A. School E.

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

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief "must be tailored" to meet a student's "unique needs." Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

A recent case in the District of Columbia underscores the point that an IHO need not grant relief for a non-public school if a public school is available. In N.T. v. District of Columbia, 2012 WL 75629 (D.D.C. 2012), where there was a finding of FAPE denial, the Court found that a non-public placement was not justified because, inter alia, the parents "have not argued, let alone demonstrated," that a public school could not meet the student's educational needs. Id. At *4.

There is no testimony in the record from School E. There is no testimony from any of Petitioner's witnesses in specific support of placement at School E. There is no testimony or evidence explaining why School E might meet the Student's special education needs in terms of social, emotional and behavioral issues, math issues, or reading comprehension issues. The request for funding for School E must be denied.

B. New Program.

Petitioner contends alternatively that the Student receive at least 15 hours of special education instruction outside the general education setting, reading goals in math, reading and speech and language, and speech and language therapy and occupational therapy.

The IDEA requires that children with disabilities be placed in the "least restrictive environment." This means, "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." N.T. v. District of Columbia, 839 F. Supp.2d 29, 34-35 (D.D.C. 2012); Dist. of Columbia v. Nelson, 811 F. Supp. 2d 508, 514-15 (D.D.C. 2011); 20 U.S.C. § 1412(a)(5)(A).

As discussed, the record establishes that the Student has special education needs in math and reading. The Student should receive special education services during classroom instruction in both subject matter areas. The Student should also receive academic goals in both reading and math in her next IEP. However, it will be unclear how those services should be delivered until the Student is assessed by a qualified professsional with experience in working with Students who have attendance and tardiness issues. Petitioner has received an authorization for an I.E.E. to provide the Student with a comprehensive psychological assessment. Petitioner should use this authorization to obtain an assessment from a qualified professional with experience in working with students who have truancy and/or tardiness issues. This professional should then thoroughly assesses the Student's issues with absences and tardiness and write a specific plan on how Respondent can create a program that will result in improved

attendance and tardiness. The IEP team should then reconvene, review such report and recreate the Student's educational program.

With respect to the Petitioner's request to include speech and language services in the IEP, Petitioner did not call any witness with specific experience in providing or assessing services in speech and language therapy to bolster her argument. I find that the assessment of DCPS examinder Judith Edghill of Respondent to be well-written, balanced and thoughtful. This assessment indicated that the Student did not need speech and language therapy. Petitioner's request for speech and language therapy in the Student's IEP relief in this connection is denied.

With respect to Petitioner's request for occupational therapy in the IEP, Petitioner did not call any witness qualified in occupational therapy to support her argument. Petitioner's argument rests exclusively on the conclusions of Dr. Nelson, which were not sufficiently compelling in this connection given her lack of credentials in occupational therapy. Petitioner's request for occupational therapy services in the Student's IEP is denied.

C. Compensatory Education.

One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services...to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at

524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student").

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

Petitioner presented Educational Advocate Mia Long in this connection. Ms. Long indicated that Petitioner is seeking 72 hours of individualized tutoring for the Student. Ms. Long established herself as credible in testimony and presented a reasonable plan which was developed in view of the Reid standards. In particular, the plan seeks to provide the Student with remediation to allow the student to get to the level she would have been at had she received a FAPE. Ms. Long's research estimates that 36 hours of individualized tutoring in each subject can allow for approximately one year of academic growth. Ms. Long cites to scholarly articles in her presentation, and Respondent has not disputed the accuracy of these estimates or these articles. Furthermore, there is evidence in the record that this Student particularly benefits from individualized instruction. As a result, this Hearing Officer is persuaded that 72 hours of individualized tutoring (36 math, 36 reading) is an appropriate compensatory education remedy for this Student. The individualized tutoring must come from a licensed special education teacher.

Given the Student's history of truancy, this Hearing Officer finds it reasonable and appropriate to place conditions on the Student's tutoring. Accordingly, I will order that any and all absences from tutoring be documented by a note from a physician. Such medical note shall be provided to Respondent within 3 business days of the absence date. If Petitioner fails to provide a medical note relating to such absence date to Respondent so that Respondent receives it within 3 business days of the absence date, all tutoring may be terminated by Respondent.

Finally, Petitioner also requests, in her compensatory education plan, remediation in a two other areas. Petitioner seeks 20 hours of counseling services and 20 hours of speech and language therapy. However, Petitioner has not shown that the Student was denied speech and language therapy that she was due as a result of the May 16, 2011 or October 26, 2011 IEPs. Moreover, Petitioner does not explained how this amount of speech or counseling might "provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Petitioner did not call a counselor or a speech and language therapist to support these claims for relief. Under the circumstances, I will deny these claims for relief.

D. Assessments.

Petitioner also requests an occupational therapy assessment, a speech and language therapy assessment, and a comprehensive psychological assessment.

Respondents have submitted authorizations for Petitioner to receive an I.E.E. for an occupational therapy assessment and a comprehensive psychological assessment. Such comprehensive psychological assessment should focus on the Student's absenteeism and tardiness issues, as discussed previously. With respect to Petitioner's request for a speech and

language therapy assessment, the Student has had two such assessments in the past two years. The record indicates that no such assessment is needed at this time. This request must be denied.

ORDER

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

1. Petitioner shall use the I.E.E. for a comprehensive psychological assessment by engaging the services of a qualified professsional with experience in working with Students who have attendance and tardiness issues. Such professional shall conduct a thorough assesment of the Student, focusing on attendance and tardiness issues. Such professional shall issue a report that specifically indicates how Respondent can create a program that will result in the Student's improved attendance and tardiness. This report shall be completed within 30 days of the date of this HOD;

2. Within 10 days of the issuance of the report, the IEP team should then reconvene, review such report and rewrite the Student's IEP;

3. Such IEP shall provide the Student with special education services in the classroom to address deficits in both math and reading. Such IEP shall include reading and math goals;

4. Respondent will provide the Student with 72 hours of individualized tutoring by a licensed special education teacher during the 2012-2013 school year (36 hours in math, 36 hours in reading);

5. Any and all absences from the tutoring program must be documented by a note from a physician, and such medical note shall be provided to Respondent within 3 business days of the absence date;

6. If Petitioner fails to provide a medical note relating to such absence date to Respondent so that Respondent receives it within 3 business days of the absence date, the tutoring program may be terminated by Respondent;

7. Petitioner's other claims are hereby denied with prejudice.

Dated: November 21, 2012

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Date: November 21, 2012

Michael Lazan
Impartial Hearing Officer