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

Date Issued: March 9, 2012

Student,[1] by and
through the Petitioner,

Hearing Officer: Michael Lazan

Petitioner

v.

District of Columbia Public Schools,

Respondent.

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HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") dated January 9, 2012. This IHO was appointed to hear this matter shortly thereafter, on January 10, 2012. Respondent filed a Response to the Complaint on January 19, 2012. A resolution meeting was held on January 24, 2012. The parties, however, were not able to reach an agreement. The parties agreed in writing that no resolution was possible and the 45 day timeline commenced on the date following such resolution meeting. The HOD was due on March 9, 2012.

A Prehearing Conference was held on February 9, 2012. A Prehearing Conference Summary and Order was issued on February 15, 2012.

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

Hearings were held on February 27, 28, 29, 2012. These were closed hearings, and the

The parties entered into evidence Stipulations of Fact. (IHO Exh. 1) The parties entered into evidence Joint Exhibits 1-10. Petitioners entered into evidence exhibits 1-58; Respondent entered into evidence exhibits 1-8, 11. Petitioner presented as witnesses: Petitioner; Micki Marquardt, program therapist and clinical program manager,

Benjamin Persett, Program Manager, DCPS; Katherine Phillips,

Occupational Therapist; Judith Ross, Tutor; Principal of

Gladys Sweeney, M.Ed.,Ph.D; Jenney Wilder, Educational Consultant.

Respondent presented as witnesses: After the hearing, the parties agreed to submit closing arguments on March 2, 2012. Petitioner moved to extend the time to submit the closing arguments to March 5, 2012 because she was unable to receive the audio of the hearings until March 2, 2012. Petitioner also moved for a continuance to allow this Hearing Officer additional time to review the closing arguments. There was no objection from Respondent on either issue. This Hearing Officer granted the application to extend the time for submitting the closing arguments, but denied the application for a continuance because it was unnecessary. The parties submitted closing arguments on March 5, 2012.

JURISDICTION

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

Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Student is male, years old, and eligible for services as a student with multiple disabilities. He is currently not attending school but receives tutoring services and occupational therapy services at home. The Due Process Complaint requests a finding that Respondent denied the Student a FAPE through the period August, 2011 through October 11, 2011 because Respondent did not have a current IEP for the Student. The Complaint also requests a finding that Respondent denied the Student a FAPE from October 11, 2011 through the present because Respondent's IEP was procedurally and substantively flawed. The Petitioner seeks, as relief: 1) placement at 2) a new IEP upon receipt of the diagnostic and evaluation materials from 3) compensatory educational services; 4) reimbursement of educational and related services provided to the Student from August, 2011 to date.

ISSUES

The issues to be determined are as follows:

a. Did Respondent deny the Student a FAPE by failing to provide the Student with an IEP for the period August, 2011 through October 11, 2011?

b. Did Respondent deny the Student a FAPE by providing the Student with an educational setting of for the period August, 2011 through October 11, 2011?

c. Did Respondent deny the Student a FAPE by offering the Student an inappropriate educational program at the IEP meeting dated October 11, 2011?

d. Did Respondent deny the Student a FAPE by offering the Student the educational setting of in connection with the IEP dated October 11, 2011?

e. Did Respondent deny the parents the opportunity to meaningfully participate in the IEP process by "predetermining" the result of the October 11, 2011 IEP meeting because a school was selected prior to the meeting and a draft IEP was prepared prior to the meeting?

f. Did Respondent's October 11, 2011 IEP contain inappropriate present levels of performance for the Student?

g. Did Respondent's October 11, 2011 IEP contain inappropriate goals and objectives for the Student?

h. Did Respondent fail to adequately review sufficient evaluative data in connection to the October 11, 2011 IEP meeting?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student was born on May 12, 2000. (IHO Exh. 1 par. 1)

2. A Neuropsychological Evaluation of the Student dated June 28, 2005 by Drs. Weber and Kenealy reported significant weaknesses in attentional control, executive functioning skills, emotional control, working memory, cognitive flexibility, and self-regulation/inhibitory control. This was deemed consistent with Attention Deficit Hyperactivity Disorder, Predominantly Combined Type. (IHO Exh 1 par. 7; see P-26)

3. The Student attended School A per an IEP dated April 18, 2007. Such IEP called for the Student to receive a full-time special education program with occupational therapy,

psychological counseling, speech and language therapy. The Student attended School A for 2007-2008. (IHO Exh. 1, par. 18)

4. In July 2008, the Student was evaluated by Martha Bridge Denckla, M.D., of the Kennedy-Krieger Institute. Dr. Denckla stated that the Student have severe difficulties with motor control and cognitive control, is very sensitive to praise and reinforcement. She stated that the Student has the extreme self-regulatory form of ADHD, commonly called full hyperactive-impulse variety. He also has Developmental Motor Coordination Disorder. She indicated that the Student needs an environment that is positively oriented, the total opposite of the "zero tolerance" approach. She indicated that the Student is quite unusual in the severity of his issues. (IHO Exh. 1, par. 26)

5. In August, 2008 and September, 2008, the Student was evaluated by Brenda Elliott, Ph.D. and William Stixrud, Ph.D. These doctors diagnosed the Student with ADHD-Combined Type, Developmental Coordination Disorder, Learning Disorders in Reading, Writing, Math, Anxiety Disorder with Obsessive Compulsive Features, Stereotyped Movement Disorder, and Social Learning Disorder. They recommended continued placement in a full-time special education environment within the context of a "nurturing and highly supportive" school community, with related services of speech and language therapy, occupational therapy, psychotherapy. (IHO Exh. 1, par 27)

6. The Student attended School A for the 2008-2009 school year.

7. An IEP dated June 9, 2009 recommended a change in placement from School A because substantial regression was noted during the 2008-2009 school year. (IHO Exh. 1, par. 33)

8. On September 15, 2009, Dr. Marilyn Benoit, a psychiatrist, wrote a one page statement regarding the Student and determined that he had a significant sensory integration problem and recommended home-based instruction by credentialed special education teachers who are "skilled in managing complex issues." (IHO Exh. 1, par. 36.; JE 3-1)

9. On October 1, 2009, the Student had a neurological consultation from Bennett Lavenstein. M.D. The consultation indicated that the Student has had the emergence of tics and obsessive-compulsive symptomology superimposed on ADHD symptoms. There is a reference to Tourette's Syndrome. (P-2-2)

10. The Student was on a home program from October 21, 2009 until August, 29, 2011. This home program consisted of 21 hours of service per week, including tutoring, speech, counseling services and occupational therapy. These services were provided through Respondent. (IHO Exh. 1 pars. 37-42; Testimony of parent)

11. An evaluation by Psychologist Maria Zimmitti, Ph.D., dated October 27, 2010, found that the Student's reading skills, writing skills and mathematics skills on the Woodcock-Johnson III fell consistently within the low to very low range. On the WISC-IV, the Student tested at the average range for verbal comprehension, but extremely low for working memory, processing speed. Full Scale IQ was tested as 63. In the Vineland Adaptive Behavior Scales, the Student's scores were adequate in terms of receptive and expressive communication, but moderately low to low in all other domains. (Exh. P-9-3)

12. In Spring 2011, Respondent and Petitioner arranged for the Student to attend School B, a private, full-time special education school. The Student began attending the school on August 29, 2011. (IHO Exh. 1 par. 41-42)

13. On September 21, 2011, School B informed Respondent that it was not an appropriate placement for the Student and that the Student's last day would be October 11, 2011. (IHO Exh. 1 par. 43)

14. The Performance Summary from School B indicates that the Student was accompanied by a 1:1 aide in the school. It reports that the Student is a complex individual who shifts quickly from a state of moderate calm to high agitation numerous times during the school day. (JE-5-1-2)

15. The Performance Summary indicates that the antecedents for these shifts are often internal and his maladaptive coping mechanisms often result in unsafe and disruptive behavior. Behavior includes sensory dysregulation, impulsive behavior including screaming, cursing, pushing the emergency button in class, turning dials in electronic equipment in the classroom, work refusal, self-injurious behavior such as repeated picking at wounds, loose tooth twisting, head banging, defiant behaviors such as elopement, peer mocking, written threats to peers and staff, pushing over desks and chairs, throwing objects, spitting, hitting, kicking, destroying property. (JE 5-1-2)

16. The Performance Summary indicates that the Student was unable to focus after lunch/recess. The Student was unable to stay in a classroom for more than 15-20 minutes at a time. The Student was on the 1:1 plan in the afternoon. (JE 5-3)

17. Testing at School B indicated that the Student scored a 16% on a K-3 Level Words Their Way Primary Spelling assessment, indicating that there was approximately kindergarten level encoding capability. (JE 5-3)

18. Testing at School B indicated that the Student scored 1% on a capitalization test, indicating that he does not know the rules of capitalization. (JE 5-3)

19. In terms of decoding and reading fluency, the Student measures at the late 1st grade level. (JE 5-3)

20. The counselor at School B indicated that the Student presents a complex set of behaviors that can be due to antecedents that may or may not be known to him or those around him. (JE-5-5)

21. The behavior management system at School B was PBIS, a positive behavioral intervention system. This system did not work for the Student. (JE 5-5-6)

22. Other systems attempted for the Student included a "check-in check-out system" that monitored his behavior in class with more frequent rewards; an individualized schedule with built-in breaks; a behavior plan that tied into home-based rewards. (JE 5-5-6)

23. After leaving School B, the Student was a changed child; he became more compulsive, he began "picking" on things, became more reactive to sound. (Testimony of parent)

24. On September 26, 2011, Respondent referred the Student to the the and the (IHO Exh. 1 par. 44)

25. On September 26, 2011, Psychiatric Social Worker Ubax Hussein indicated in an evaluation that the Student told a school peer and a music teacher that he wants to "kill everyone at the school." (JE 2-1)

26. On or about late September/early October, 2011, School B prepared a draft IEP for the Student. Respondent sent this IEP to School C, a private, full-time special education school in Maryland. (IHO Exh. 1 par. 48; Testimony of Persett)

27. The District sought out schools for the Student based on the success of these schools with similar students. (Testimony of Persett)

28. On October 6-10, 2011, Gladys Sweeney, Ph.D., evaluated the Student. The Student tested with a great deal of "scatter" on the WISC-IV, with standard score of 110 in terms of verbal comprehension and a standard score of 65 in terms of processing speed. Full Scale IQ score was deemed to be 78. Dr. Sweeney indicated that the Student should not be placed in an educational setting. She indicated that his clinical picture is very complex, and that there is a need for a clear assessment of his multiple diagnoses. (JE 8-3-5)

29. On October 10, 2011, Judith Rapoport, M.D. conducted a "consultation" with the Student. Dr. Rapoport indicated that it was hard to "disentangle" the developmental problems and the behavioral/executive function problems. She indicated that proper educational placement with a highly individualized plan would be her first priority. She indicated that "it is possible" that a residential treatment setting will be most appropriate for socialization skills. (JE 10-60-63; P-13-1-3)

30. On October 11, 2011, an IEP meeting resulted in a review of the Student's experience at School B. The IEP team indicated that School C had accepted the Student. The Petitioner rejected this school. (IHO Exh. 1 pars. 49-52)

31. The Petitioner objected to the IEP. Petitioner indicated that the IEP could not be properly created with the available assessments. The team did not review the evaluations of Dr. Sweeney and Dr. Rapoport. (P-15-1; P-17-2; Testimony of parent; Testimony of Persett)

32. Respondent would not provide a home tutor at this meeting. (P-17-3)

33. The IEP reflecting the meeting dated October 11, 2011 indicated that the Student's Present Levels of Educational Performance in terms of math are unknown since the Student is unable to remain in the classroom during math groups. (JE 6-3)

34. Math goals relate to money comprehension, adding and subtracting three digit whole numbers, participating in testing to determine if he knows mathematics, demonstrating an understanding of multiplication facts. For each such goal, no baseline is indicated. It is also indicated that it is unknown if the Student is able to meet such goals because the Student will not participate in classroom activities. (JE 6-3-4)

35. The IEP reflecting the meeting dated October 11, 2011 indicated that the Student's Present Levels of Educational Performance in terms of Reading are mostly unknown since the Student was unable to stay in a small reading group for more than 15 minutes. (JE 6-4)

36. The IEP reflecting the meeting dated October 11, 2011 indicates that the Student has difficulty with phonemic awareness and has learned to read through sight word recognition. It indicates that the Student has an extensive vocabulary but does not use it in everyday conversation. He needs a full reading assessment, and reading needs cannot be addressed without understanding such needs. (JE 6-4)

37. The IEP reflecting the meeting dated October 11, 2011 contains reading goals relate to reading a third grade passage, 45-50 words per minute with less than three errors; participating in classroom assessments in one of four opportunities; determining the cause and effect of a fictional reading passage with 80 percent accuracy in 4/5 opportunities; accurately sequencing a series of events from a fictional text with 80 percent accuracy in 4/5 opportunities. (JE 6-4-5)

38. The IEP reflecting the meeting dated October 11, 2011 indicates that the Student's Present Level of Educational Performance in terms of Written Expression are such that the Student cannot write a legible sentence. He will write several sentences in a row when the

topic is preferred, but the result will be illegible. His writing needs include the need to work on basic writing skills such as sentence structure, capitalization, parts of speech. (JE-5-5)

39. The IEP reflecting the meeting dated October 11, 2011 contains writing goals relating to encoding words with vowel digraphs and dipthongs with 70 percent accuracy in 4/5 trials; encoding regular plurals; identifying and dictating correct beginning sentence capitalization and capitalization for names and places with 70 percent accuracy in 4/5 opportunities samples; distinguishing between complete and incomplete sentences, recognizing and using correct word order in written sentences, employing correct usage for subject-verb agreement and single and plural irregular nouns when dictating and/or writing sentences with 70 percent accuracy in 4/5 opportunities sampled. It is indicated that it is not known whether the Student can accurately dictate or write a sentence, or whether the student is cognizant of subject-verb relationships. (JE-5-6)

40. The IEP reflecting the meeting dated October 11, 2011 indicated that the Student's Present Levels of Educational Performance in terms of Communication/Speech and Language include many interfering behaviors that make it difficult for him to access therapy. Half of therapy ends up in a "break-out" room. The Student can understand basic concepts and answer WH questions, but cannot generalize his ability to make inferences or understand other people's perspectives. (JE 5-7)

41. The IEP reflecting the meeting dated October 11, 2011 contains speech goals relating to identifying and understanding non-verbal communication, engaging in verbal interactions with peers in 4/5 opportunities, using appropriate language to express ideas, and answering why questions in every day interactions in 4/5 opportunities. (JE 5-7)

42. The IEP reflecting the meeting date October 11, 2011 indicates that the Student's Present Level of Educational Performance in terms of Emotional, Social and Behavioral Development are "challenging." The Student is easily overwhelmed in the school setting by the constant need for social interactions with peers and academic expectations of school. It indicates that the Student is having severe difficulty transitioning from a 1:1 home school setting to a small group learning environment at school. It indicates that the Student needs a behavioral system that will help him learn the cause and effect of his actions with immediate consequences and consistency and the ability to earn rewards as a way to reinforce positive behaviors. It indicates that the Student requires an intensive social pragmatics/skills program in which he can identify, practice and generalize age appropriate social interaction and communication with peers and staff. It indicates that the Student requires ongoing counseling support. (JE 7-8)

43. The IEP reflecting the meeting dated October 11, 2011 indicates: "(w)ith small group setting, 1:1 support, related services and various plans [the Student] continues to be unable to function in the classroom setting." (JE 7-8)

44. The IEP reflecting the meeting dated October 11, 2011 contains Emotional Social Behavioral Goals relating to using appropriate language to identify feelings without negative behaviors; maintaining safe behaviors throughout the school day; identifying situations that cause him to be upset and by using his words to return to the expected activity; using appropriate coping strategies to manage feelings when presented with frustrating situations; increasing awareness of his own feelings and those of others around him by practicing various verbal and non-verbal cues in both real life and hypothetical situations; practicing turn taking. (JE 7-8-9)

45. The IEP reflecting the meeting date October 11, 2011 indicates that the Student's Present Level of Educational Performance in terms of Motor Skills/Physical Development

reveals a Student who is best able to function in the mornings. He is often very polite. It indicates that the Student is constantly seeking touch input. Needs relate to gaining skills for self-regulation, improving sensory modulation, developing better executive functioning skills. (JE 7-10)

46. The IEP reflecting the meeting dated October 11, 2011 contains motor Skills/Physical Development goals relate to developing sensory strategies, engaging in movement tasks such as running, following 1-2 step directions, writing, tracking a moving object. (JE 7-10-11)

47. The IEP reflecting the meeting date October 11, 2011 indicates that the Student requires 26.6 hours a week of specialized instruction outside the general education setting, with 120 minutes per week of speech and language therapy, 180 minutes a week of occupational therapy, 120 minutes per week of behavioral support services. A specific behavior plan, multiple methods or behavioral analysis and support, sensory tools and diet, reducing words on the page, dicatated responses, a read aloud for classroom work, availability of a quiet space, amplification, preferred seating, supported transitions are recommended. A dedicated aide is recommended. (JE 7-12)

48. The IEP reflecting the meeting dated October 11, 2011 indicates that repetition of directions, simplification of oral directions, calculators, write in test books, copy from paper, "pointing response", small group setting, individual testing, breaks during subtests, flexible scheduling are recommended for the Student. (JE 7-14)

50. The setting designated for the Student as a result of the October 11, 2011 IEP meeting was School C, a non-public school located in Maryland. (Testimony of Williams)

51. This School provides a therapeutic support program for students with behavioral issues, with classes that have 8-12 students in the class. The school uses a school-wide positive behavioral system to maintain students in class. (Testimony of Williams)

51. On October 11, 2011, Respondent sent the Petitioner Prior Written Notice for the Student to attend School C. (IHO Exh. 1 par. 52)

52. After October 11, 2011, the Student has received tutoring at home from Judith Ross, a tutor with the company My Learning Springboard. Petitioner has paid for this tutoring. (IHO Exh. 1 par. 54, 56)

53. Ms. Ross provides tutoring for the Student several mornings a week depending on her schedule. She is a general education teacher. She provides the Student with work on story problems, math that is money oriented, reading, vocabulary, writing, graphing, science, spelling. The Student greets her eager to work and has benefitted from her tutoring. He has improved in his listening, answers more questions, he has improved his writing. (Testimony of

54. After October 11, 2011, the Student has received occupational therapy services from The Floortime Center, LLC. Petitioner has paid for this therapy. The therapist, Katherine Phillips, works with the DIR model, which involves pretend play and accessing the student's "motivations". (IHO Exh. 1 par. 55, 56; Testimony of Phillips)

55. The Student's occupational therapy needs include "regulation," sensory issues, visual needs. Ms. Phillips had worked with the Student previously and noticed that the Student had regressed since the previous work from November, 2009 through August, 2011. When the Student returned to work with her, the Student was angry. There was not as much "back and forth" as there was previously. Ms. Phillips is working on getting the Student to "unlearn" some of the difficulties that manifest themselves as a result of the Student's time at School B. This

therapist works with the Student on controlling his reactions to stimuli, keeping his body regulated, communication skills. She provides "sensory" based services. The therapist works with the Student's "internal motivation" to try to get him to interact. The therapist indicated that this approach has been successful with the Student and allowed him to engage in additional back and forth communication. The Floortime Center indicates that 5 hours per week is the appropriate amount of service to allow the Student to progress adequately. (Testimony of Phillips)

56. During occupational therapy, the Student prefers a room that is smaller with less toys, less visual stimulation. (Testimony of Phillips)

57. Occupational therapy at Floortime is provided in three month cycles. After three months, the program re-evaluates the Student to determine if he is making progress. (Exh. 31)

58. The Student was clinically approved for admission to on December 6, 2011. At which is located in Texas, the Student would receive a comprehensive psychiatric assessment, a battery of neuropsychological testing, as well as a "Quantitative EEG". The Student would also receive individual, group and family therapy. Educational services would be provided by an on-campus school, School D. (P-34-1)

59. The cost of is to per day. (Testimony of parent)

60. has 100-120 beds and seven programs, four neurodevelopmental programs, and three "traditional" programs. (Testimony of Marquardt)

61. The staff at uses positive disciplinary techniques on the children. (Testimony of Marquardt)

62. The children are grouped with other children. (Testimony of Marquardt)

63. There is an initial assessment period, and then a treatment plan is recommended for the children. (Testimony of Marquardt)

64. The children are enrolled at School D while attending the residential treatment center. (Testimony of Marquardt)

65. They do not provide 1:1 instruction at School D. (Testimony of Marquardt; Testimony of Rollins)

66. At School D, the student body consists entirely of children from The typical population are children with neurological and behavioral issues. The classroom is multi-grade level. (Testimony of Rollins)

67. On December 19, 2011, Respondent forwarded to the District of Columbia Department of Mental Health a document titled "Admission to a Psychiatric Residential Treatment Facility Medical Necessity Review Form." (IHO Ex. 1 par. 59)

68. The form was signed by Benjamin Persett of Respondent. Under :Justification for PRTF Level of Care, the form indicates the Student "is not presently ready to be placed in an educational setting. His clinical picture is very complex and until we have a clear assessment of his multiple diagnoses, and how all of these factors are playing out in his functioning we will not be addressing this child's needs due to current inability to assess present levels of performance and functional behavior and therefore inability to develop an appropriate educational program. There is also a need to assess his visual problems and elaborate treatment strategies to give him the tools to cope with this impairment. We also need a greater understanding of his anxiety sympomatology and to develop a proper treatment for them. In addition, there is a great need to assess the proper medication regimen that might best be suited for his needs. The ideal place for this to take place is a therapeutic in-patient treatment facility, where he can be observed, and

treated. In my opinion, placing him in an educational school without further exploring the multiplicity of his impairments, its effects, its treatment, might put him at risk for worsening of his psychological condition. Reintegration into an education setting has failed; a PRTE is appropriate." (JE 10-8, 12)

69. A Report by the Floortime Center dated January 17, 2012 recommended a program for the Student. The program consists of a home program, with "parent hangout" sessions; a clinical program with occupational therapy 5 times a week, at an hour, with at least one two hour session per week, hangout time/mentor development, for a minimum of 7 hours per week at per hour (consisting of building a mentor relationship, using "techniques to stimulate logical and reflective thinking"); program oversight/emotionally focused hangout time for a minimum of 2 hours per week, at per hour (to oversee the program to ensure that "adjustments are being made weekly to optimize growth"; visual cognitive therapy at per hour (to work on visual-spatial processing, visual thinking, ocularmotor functioning and other goals); "social" at per hour. (P-31-1-3)

70. Invoices from My Learning Springboard to Petitioner from November 7, 2011 through February 10, 2012 totaled (P-32)

71. Invoices from the Floortime Center, LLC to Petitioner from November 4, 2011 through February 10, 2012 totaled (P-33)

72. Petitioner is having a "hard time" with the notion that she send her child far away. Petitioner was not interested in a program in Wisconsin because it was too far for the Student. (Testimony of Wilder)

73. The Student is social, very eager to please, and receptive to learning. He will take in information if comfortable. He can be brought back to task if the person working with him is firm and calm. (Testimony of

74. The Student enjoys story problems, math that is money oriented. He prefers a simple layout on paper, and has poor graphomotor skills. He knows phonics, how to identify letters, and needs more practice in writing. (Testimony of

75 The Student needs preplanning, needs to see that he is progressing in small steps. (Testimony of Ross)

76. After about two hours, the Student has had enough instruction. He can go about 20 minutes without a break. (Testimony of Testimony of parent)

77.. The Student tends to does better in the morning. (Testimony of parent; JE-5)

78. The Student responds to" touch therapy". (Testimony of

79. The Student's medical condition is unclear at this point, and additional testing and evaluation is necessary to determine the etiology of the Student's issues. (Testimony of Wilder; Testimony of Sweeney; Testimony of parent; JE 10-13)

80. Were the Student placed in a school environment, the school environment would work better if the Student had 1:1 instruction, if the Student was surrounded by other children who are "calm," and if the classroom environment were very small. (Testimony of Testimony of Phillips)

81. The Student needs to work on spelling, computational skills, he must learn how to learn in a school, and must learn how to control his behavior. (Testimony of

82. This Hearing Officer found all witness credible except Gladys Sweeney, who I found partly credible.

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. DCMR 5-3030.3; see, 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).

1. FAPE, August 2011 through October 11, 2011.

The IEP must be prepared and reviewed at least annually by school officials with the participation of the child's parents or guardian. Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 182 (1982); 20 U.S.C. Sect. 1414(a)(5). Congress envisioned the IEP as the "centerpiece" of the educational program, Honig v. Doe, 484 U.S. 305, 311 (1988),

The undisputed record indicates that, prior to October 11, 2011, the Student's last IEP was in June, 2009. The Student was placed at School B without a current IEP. The undisputed record also indicates that the Student had material problems at School B from August, 2011 through the end of September, 2011. The Performance Summary from School B indicates that the Student was accompanied by a 1:1 aide in the school, but is a complex individual who shifts quickly from a state of moderate calm to high agitation numerous times during the school day. School B deemed the antecedents for these shifts in behavior "internal." School B reported

frequent unsafe and disruptive behavior, including screaming, cursing, pushing the emergency button in class, turning dials in electronic equipment in the classroom, work refusal, self-injurious behavior such as repeated picking at wounds, loose tooth twisting, head banging, defiant behaviors such as elopement, peer mocking, written threats to peers and staff, pushing over desks and chairs, throwing objects, spitting, hitting, kicking, destroying property.

The Report indicated that the behavior management system at School B was PBIS, a positive behavioral intervention system. This system did not work for the Student. Other systems attempted for the Student, but none worked. As a result, the Student was discharged from the school after about 30 days.

Respondent contends that the Student's difficulty at School B was a function of the Petitioner's decision to keep him home for the previous two years. The contention is not supported by the record. The record indicates that the home instruction was authorized and paid for by Respondent. It should be noted that home instruction is specifically contemplated in the IDEA statute, which provides that:

> "Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, **home instruction**, and instructions in hospitals and institutions."

20 U.S.C. Sect. 1401(16)(emphasis added).

Accordingly, I find that Respondent denied the Student a FAPE from August, 2011 through October 11, 2011 by failing to provide the Student with an IEP or an appropriate educational setting.

2. FAPE from October 11, 2011 through the Present.

Petitioner alleges that Respondent violated the Student's right to a FAPE by the October 11, 2011 IEP, which provided for the educational setting of School C. The testimony in the record indicates that the 26.6 hours were to be provided at School C, a school for children with disabilities.

DCMR 5-3005.9, indicates that an LEA should ensure that "a variety of assessment tools and strategies" are used to gather relevant functional and developmental information about the child. N.G. v. District of Columbia, 556 F. Supp.2d 11 (D.D.C. 2008). The focus should not be on obtaining a "single general intelligence quotient," but should instead include tests "tailored to assess specific areas of educational need." DCMR 5-3005.9(d). All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. Evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." DCMR 5-3005.9(h).

The Student had just been asked to leave a special education school after numerous extreme behavioral incidents. The Performance Summary from School B suggests that it was unclear to them what the antecedents to the behavioral incidents were. The IEP team did not have any current assessments in front of it to determine the antecedents of the behaviors. However, the IEP team did not seek to arrange any new assessments of the Student to determine his social and emotional needs or to determine the antecedents to these negative behaviors. The record indicates that the IEP team also did not review the recent evaluations of the Petitioner's providers. The record indicates that Petitioner objected to the review because she felt the team lacked adequate information to determine an educational placement of the Student.

The testimony of the witness from School C indicates that the school primarily uses positive behavioral support systems to regulate its students. This is consistent with the IEP, which indicates that the Student requires a "behavioral system" to help him learn cause and effect "with the ability to earn rewards as a way to reinforce positive behaviors." However, the Performance Summary from School B indicates that such a system has already been tried at School B, to no avail. The Summary indicates that: "it became evident immediately that this behavior management system was not sufficient to meet the Student's needs." The summary also indicates that other behavioral systems

were tried at School B, none of which met with any success. This includes a "check-in check-out" system, an individualized schedule with built-in breaks, a behavior plan that tied in with behavior at school.

In regard to academics, the IEP Team did not rely on up-to-date educational assessments when writing up the Student's levels. Accordingly, the Present Levels of Academic Performance sections of the IEP indicate that math levels are unknown, the reading levels are mostly unknown. The IEP specifically indicates that the Student "must complete a full reading assessment," that the Student's "reading needs will not be addressed without understanding his full needs." Moreover, all the math goals indicate that "(i)t is not known if [the Student] can do any of these skills as he will not participate in testing in the classroom." A review of the IEP indicates that many of the goals do not contain baselines. Without baselines on the goals, it would be difficult for a teacher to measure a student's academic progress. Without appropriate Present Levels of Performance, a teacher would have difficulty knowing how to functionally group a student, what instructional approaches to follow, or how to design curriculum.

Finally, at School B, the Student deteriorated in the afternoon. This statement is consistent with testimony from Petitioner, who has indicated that the Student does not function well in the afternoon. The School B Performance Summary indicates that the Student was "on a 1:1 plan" in the afternoon. In the morning, the Student's performance was not satisfactory either. The Summary also indicates that the Student cannot stay in the classroom for more than 15-20 minutes. Even in a 1:1 environment where the Student is being actively engaged by an adult on a subject to his interest, the Student is not able to stay focused and on task. The Student's tutor indicated that he can only be instructed for 2 hours, maximum. Without any new assessments or a current and complete behavior plan, I find that the Student could not be maintained in a classroom at School C over a full school day.

While I do not agree with the parents that they were denied an opportunity to meaningfully participate in the IEP process since they were given an opportunity to express their views at the IEP meeting and chose not to, T.P. and S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 (2d Cir. 2009), I find that the IEP team, through the October 11, 2011 IEP, denied the Student a FAPE for 2011-2012 because: 1) the IEP team did not rely on sufficient evaluative data; 2) the educational setting at School C would employ the same or similar behavioral supports that did not work at School B; 3) the Present Levels of Academic Performance in the IEP are incomplete and do not reflect the Student's abilities; 4) the goals in the IEP do not contain baselines and are not measurable.

3. Reimbursement: Occupational Therapy/Tutoring.

Petitioner seeks reimbursement for expenses incurred during the time period after October 11, 2011.

Parents may be reimbursed for tutoring expenses incurred during a time period wherein an LEA denied a Student a FAPE. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993)); Solomon-Lane v. District of Columbia, 2005 WL 763533 (D.D.C. 2005); Anchorage School District v. M.P., 2011 WL 5149140 (9th Cir. 2011).

The testimony and evidence from the tutor, Judith Ross, and the occupational therapist, Katherine Phillips, described in detail services rendered to the Student. testified that she provided the Student with direct instruction in a variety of subjects including on story problems, math that is money oriented, reading, vocabulary, writing, graphing, science, spelling. The Student always comes to the door eager to work, and has benefitted from her tutoring. He has improved in his listening, answers more questions, he has improved his writing.

is a well-credential general education teacher who came across as credible during testimony. I find that this tutoring was an appropriate service for this Student.

The testimony and evidence from Ms. Phillips indicates that she provided the Student with services through the DIR model, which involves pretend play and accessing the student's motivation. This therapist works with the Student on controlling his reactions to stimuli, keeping his body regulated, communication skills. The record indicates that Ms. Phillips displays knowledge about the Student and provided therapy that benefitted the Student in terms of communication skills and behavior. I find that this therapy was appropriate for the Student.

I note that there is no objection from Respondent on these issues. I will order that Respondent reimburse the Petitioner for all expenses incurred in connection to services rendered by Ms. Phillips and Ms. Ross from October 11, 2011 through the present.

4. Compensatory Education: Floortime.

Petitioner seeks, as part of her award, relief in the form of the "intensive occupational therapy program" as recommended by Floortime Center. (Exh. 31)

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.

The record establishes that Ms. Phillips is focused on getting the Student to "unlearn" some of the difficulties that now manifest themselves as a result of the Student's time at School B. Reid, 401 F.3d at 523. This therapist works with the Student on controlling his reactions to stimuli, keeping his body regulated, communication skills. She provides "sensory" based services. The therapist works with the Student's "internal motivation" to try to get him to interact. The therapist indicated that this approach has been successful with the Student and allowed him to engage in additional back and forth communication. The Floortime Center report (P-31) indicates that 5 hours per week is the appropriate amount of service to allow the Student to progress adequately. There is nothing in the record to the contrary. I find that 5 hours a week of occupational therapy from Ms. Phillips is appropriate for this Student.

Any such award would not constitute "double-dipping." Breanne C. v. Southren York County School Dist., 732 F. Supp.2d 474, 488 (M.D. Pa. 2010). Though I have awarded Petitioner reimbursement for all occupational therapy provided to the Student after October 11, 2011 through to the present, no occupational therapy was provided to the Student by Ms. Phillips during the Student's time at School B. Further, the invoices in the record indicate that the

Petitioner was not able to provide the Student with regular occupational therapy after October 11, 2011. Under the circumstances, I will award the Petitioner with 5 hours a week of occupational therapy for three months, which is the typical cycle of services provided at the

The report also references various other services, including hangout time/mentor development, program oversight/emotionally focused hangout time, visual/cognitive therapy, and social therapy. None of these services are adequately explained on the record. There is nothing in the record to indicate how such services might meet the Reid standard of putting the Student in the same place as he would have been would he have not been denied a FAPE. Claims for such relief are denied.

5. Remedy of Residential Treatment Center.

Characterized as compensatory education, Petitioner seeks an award to place the child at a residential treatment center.

An award of residential placement must be tailored to meet the child's specific needs. To inform this individualized assessment, "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005)(quoting Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993)). Courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, 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. Branham, 427 F.3d at 12. Because placement decisions implicate equitable considerations, moreover, courts may also consider the parties' conduct. Id.

As a remedy, Petitioner seeks placement at a residential treatment Center in Texas. The record indicates that provides group and individual therapy to Students with psychiatric testing, neuropsychologal evaluations, and "Quantitative EEG" testing. There is no educational component to the testing and therapy at The students are sent to the School D for educational purposes. This school provides students with a class containing children with neurological and behavioral problems, with one teacher and a support person from in the classroom. There are no 1:1 instructional services provided for students, whether at or at School D.

The Student could not be maintained at School B even with a 1:1 aide. Certainly, the Student cannot be maintained in a full-time special education classroom without a dedicated aide. Without an appropriately accessed school environment, a residential treatment center is a "medical facility" that is not subject to awards pursuant to the IDEA. As stated in the well-reasoned Mary T. v. School District of Philadelphia, 575 F.3d 235 (3rd Cir. 2009), "only those residential facilities that provide special education . . .qualify for reimbursement." 575 F.3d at 243. The Court in Mary T. held that such interventions as a "token economy program," therapy groups, social groups, life skills training groups, and medication groups should not be characterized as educational services pursuant to this relief. See 34 CFR Sect. 300.104 (if a placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents).

The residential treatment center also cannot be properly characterized as a "related service" pursuant to the IDEA. In the IDEA, the term "related services" is defined to include "medical services, except that such medical services shall be for diagnostic and evaluation purposes only" as may be required to assist a student with a disability to benefit from special education. 20 U.S.C. Sects. 1401(9), 1412(a). Federal regulations indicate that "medical services" are services provided by a licensed physician to determine a child's medically related disability that results in a child's

need for special education and related services. 34 CFR Sect. 300.34(c)(5). Physician services are distinct from services provided by a hospital. Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635, 643-644 (9th Cir. 1990) As stated by the Court in Mary T., facilities such as are akin to hospital services that are specifically excluded from the IDEA. The Mary T. Court indicated that SLS, the facility at issue, "specializes in the treatment of individuals through a combination of ""assessment, diagnosis, psychotherapy, and medication management"as well as a number of group therapy offerings. Id. At 248. This description is similar to the description of which offers all of the above services. In analyzing whether SLS could be described as a "related services," the Court indicated "(i)t is worth reemphasizing that SLS has no educators on-site, offers no educational services, and is not accredited with or regulated by educational authorities." Citing the United States Supreme Court, the Third Circuit noted that "the definition of medical services was "designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." Mary T., 575 F.3d at 248 (quoting Irving Independent School District v. Tatro, 468 U.S. 883, 892 (1984)).

In this connection, it should be pointed out that this Hearing Officer is not convinced from this record that diagnostic or evaluative services cannot be located within the District of Columbia metropolitan area, or why such services must be rendered at a residential facility. Petitioner testified that she sought out providers locally, but did not clearly or completely explain why qualified providers in the well populated District of Columbia area are unavailable to assess the Student at this time. Petitioner also relies on the statements made by DCPS in regard to the Psychiatric Residential Treatment Facility Referral package, but these statements refer to a medical referral, not an educational referral. Further, the record does not indicate the context of these statements or the basis for these statements.

It also should be noted that the stay at is proposed for 2-3 months, and that Petitioner does not plan to live at with the Student. There are suggestions in the record that this is an approach that is ill-advised. The record reveals that Petitioner does not leave the Student alone with his tutor, who teaches the Student in his own home. The record also reveals that Petitioner objected to sending her child to a residential treatment center in Wisconsin. I find that the Student would benefit more from being assessed at home, where he could maintain daily personal contact with his parents. Under the circumstances, this Hearing Officer will deny the Petitioner's request to fund for the Student.

However, I agree with the Petitioner that the record establishes that the Student requires additional assessments. While Petitioner has indicated that the Student has been tested and assessed quite a bit, I find that no recent assessment has adequately determined the antecedents to the Student's behaviors or provided guidance on how to maintain those behaviors in a school setting. Moreover, I find that the Student's social and emotional condition has changed recently, and in particular as a result of the Student's difficulties at School B. Assessments "with a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" are necessary to determine an appropriate educational program for the Student. 34 CFR Sect. 300.304. Such assessments must address the Student's "social and emotional status." DCMR 5-3005.9 (g)(5). I will accordingly order Respondent to immediately reconvene the IEP team to determine what particular assessments are necessary to determine the antecedents to the Student's behavioral issues in school and to determine an appropriate behavioral plan to manage such behaviors in school. Respondent shall arrange for the completion of these assessments (or authorize the Petitioner to find appropriate providers to complete such assessments) within 60 days of this HOD. During this meeting, the IEP team must also determine appropriate services for the Student to receive until assessments are completed.

Consistent with the testimony of the tutor as to how much instruction the Student can currently benefit from, such services should include 1:1 home instruction for two hours per day, five days a week,. Consideration should be give to the location of the instruction. Such instruction shall be provided at the home at first. Respondent shall then consider attempting to provide the Student with 1:1 instruction in a school building.

After the assessments are completed, the IEP team will reconvene again within 10 days to determine an appropriate educational placement and setting for the Student.

ORDER

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

1. Respondent shall reimburse Petitioner for all educational services rendered to the Student from October 11, 2011 through the present by Judith Ross and Katherine Phillips;

2. Respondent shall provide Petitioner with occupational therapy through the services of Ms. Phillips for 5 hours a week for a three month period beginning immediately;

3. Respondent shall immediately reconvene the Student's IEP team to determine which assessments are necessary to: 1) determine antecedents to the Student's behavior in school and 2) to develop a behavioral plan that would allow the Student to attend school. Respondent shall use "a variety of assessment tools and strategies to gather relevant functional and developmental information about the child." The IEP team will also determine appropriate services for the Student to receive until assessments are completed. Such services shall include 1:1 home instruction for two hours per day, five days a week. Consideration should be give to the location of the instruction. Such instruction shall be provided at the home at first. Respondent shall consider attempting to provide the Student with 1:1 instruction in a school building after 30 calendar days.

4. Such assessments shall be completed within 60 days of the date of the issuance of this HOD. Respondent may authorize Petitioner to designate providers for such assessments.

5. Within 10 days of the completion of the assessments, the IEP team shall then meet to review the assessments and create an educational program for the Student.

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

Dated: March 9, 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: March 9, 2012

Michael Lazan
Impartial Hearing Officer