

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
December 17, 2014

Parent, on behalf of Student,¹)	
)	
Petitioners,)	Date Issued: December 16, 2014
)	
v.)	
)	
District of Columbia Public Schools,)	
)	
)	
Respondent.)	Hearing Officer: Michael Lazan

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a _____ student who is eligible for services as a student with a Specific Learning Disability.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on July 29, 2014 in regard to the Student. On August 8, 2014, Respondent filed a response. A resolution meeting was held on August 25, 2014. The resolution period expired on August 28, 2014.

II. Subject Matter Jurisdiction

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

¹ Personally identifiable information is attached as Appendix A.

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

III. Procedural History

On September 11, 2014, this Impartial Hearing Officer (“IHO”) held a prehearing conference. Laura Cofer Taylor, Esq. counsel for Petitioner, appeared. Daniel McCall, Esq. counsel for Respondent, appeared.

A prehearing conference order issued on September 15, 2014 summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date was set for September 16, 2014. Petitioner moved to adjourn the case because of illness. This adjournment was granted by the IHO.

A motion to continue was filed by Petitioner dated October 8, 2014 to accommodate the scheduling of witnesses. There was no opposition. An Order of Continuance of fifty-four days was granted by Chief Hearing Officer Virginia Dietrich on October 10, 2014, extending the decision date to December 5, 2014. The previous decision date was October 12, 2014.

Petitioner submitted Exhibits 1-42. Respondent objected to Exhibits 6, 7, 10, 13, 15, 21, 22, 26, 33, 34, and 35-41 on hearsay and relevance grounds. Respondent then withdrew exhibits 6, 7, 10, 15, 37-40, and 41. Respondent’s objections were overruled in regard to exhibits 13, 21, 22, 26, 33, 34, 35, and 36.

Respondent submitted exhibits 1-11. Respondent objected to exhibits 1-9 on hearsay and evidence grounds. These objections were overruled.

The parties were unable to complete testimony on November 21, 2014. As a result, on November 26, 2014, Petitioner moved for a second continuance to complete the testimony and to allow the IHO to write a decision. This continuance was granted by Chief Hearing Officer Virginia Dietrich on November 30, 2014. The new decision date was December 16, 2014.

A hearing date was held on December 2, 2014. Respondent moved to dismiss at the close of Petitioner's case. After hearing argument on the motion, the IHO elected to address the issues raised by Respondent's motion in this HOD.

The parties completed testimony on December 2, 2014. The parties presented closing statements orally on the record after completion of testimony. Petitioner sought permission to send a supplemental memorandum to the IHO after the hearing. Petitioner sent this to the IHO, through email, on December 5, 2014.

Petitioner presented as witnesses: Petitioner; Student; Evaluator A; Witness A, School C. Respondent presented as witnesses: Witness B, Special Education Coordinator at School A (expert in special education programming and placement); Witness C, attendance clerk at School B; Witness D, Special Education Coordinator, School B (expert in special education programming and placement).

IV. Credibility

There was no material inconsistency found in connection to any witness. However, I found Petitioner's testimony explaining that the Student was absent for some days in 2013-2014 and 2014-2015 because of nosebleeds to be unconvincing. There was

unrebutted testimony in the record that the Student's nosebleeds should not have caused any absences for the Student. All other witnesses in this proceeding were consistently credible. I found Evaluator A to be an especially well-prepared witness.

V. Issues

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

1. Did DCPS fail to provide the Student with an appropriate IEP on the following dates: September 23, 2013; October 16, 2013; January 16, 2014; March 19, 2014; and June 6, 2014? If so, did DCPS deny the Student a FAPE?

Petitioner contends that, at all these meetings, Respondent did not properly credit I.E.E.s, did not create IEPs with appropriate present levels of performance, did not write appropriate goals, and did not provide the Student with a full-time educational placement.

At the prehearing conference, the parties discussed Petitioner's claim that DCPS failed to implement the above IEPs at School B. This issue was not mentioned in the prehearing order, but was mentioned in the Due Process Complaint and discussed on the first day of hearing. Since the issue was mentioned in the Complaint, since DCPS was on notice of this issue through the prehearing conference and the hearing, and since DCPS was able to adequately defend itself in regard to this issue at the second hearing date, I will accept jurisdiction over this issue.

As relief, Petitioner seeks placement at School C and compensatory education in an amount of one hour per week of tutoring for a calendar year.

VI. Findings of Fact

1. The Student is eligible for services as a student with a Specific Learning Disability. (P-35)
2. The Student has asthma and allergies. (P-21 @ 098)
3. The Student has been diagnosed with Attention Deficit/Hyperactivity Disorder, Predominantly Inattentive Type (ADHD). He was initially diagnosed with Mood Disorder NOS and Adjustment Disorder with Mixed Disturbance of Emotions and Conduct. (P-21 @ 099)
3. He has difficulty with anger, (P-21 @ 100)
4. He often feels tired throughout the day. (P-21 @ 104)
5. He takes a long time to complete tasks, and presents as being below level in reading and writing. (P-21 @ 104)
6. He has difficulty in decoding. (Testimony of Evaluator A)
7. He has difficulty reading, and does not like to do it. (P-21 @ 101)
8. In math, he is well below level in calculation and fluency, and functions at or near the fourth grade level. (P-32 @ 180; P-21 @ 106)
9. He writes with poor punctuation and grammar, and will misspell many words. He is well below grade level in writing. (Testimony of Evaluator A)
10. He has particular weakness in working memory. (Testimony of Evaluator A)
11. He has difficulty taking in complex information and will struggle to avoid distractions. (Testimony of Evaluator A)

12. He does better in small settings. He is afraid to ask questions in a large class. (P-21@ 101)

13. A small setting will help his ADHD and provide more individualized instruction for academic issues. (Testimony of Evaluator A)

14. The Student wants to be a technician, and to graduate high school. (Testimony of Student)

15. The Student was determined to be eligible for services in 2009 as a student with Specific Learning Disability. (P-21 @ 100)

16. During the 2009-2010 school year, despite eleven hours of specialized instruction, the Student struggled in class, displaying poor grades, sleeping in class, walking out of class, and exhibiting attentional issues. He was required to repeat sixth grade. (P-21 @ 100)

17. Poor performance continued during the 2010-2011 school year. (P-21 @ 100)

18. An evaluation of the Student in March, 2011 found his cognitive ability to be in the below average range on the Reynolds Intellectual Assessment Scales (Composite Index Score: 88), with extremely low scores in working memory index on the WISC-IV and borderline scores on the Processing Speed Index of the WISC-IV. On the Woodcock-Johnson III Tests of Achievement, the Student scored in the low range in reading, broad math and writing. (P-23 @ 126-130)

19. The September, 2011 IEP provided the Student with fourteen hours of specialized instruction – eight hours inside the general education setting, and six hours

outside the general education setting – with 120 minutes of behavior support services. (P-21 @ 101)

20. A Behavior Intervention Plan (“BIP”) was written for the Student in the 2011-2012 school year to address behavioral issues with positive reinforcement and verbal praise. (P-21 @ 118)

21. By the end of the 2011-2012 school year, the Student was no longer engaging in aggressive acts or walking out of class. (P-21 @ 100)

22. The IEP for the meeting dated June 12, 2012 identified the Student as having deficiencies in math, reading, written expression, and emotional, social and behavioral development. (P-35)

23. For math, the Student was described pursuant to the NWEA measure, the Woodcock-Johnson III, benchmark exams, and the DC-CAS. These indicators showed the Student to be well below level, with demonstrated areas of need in calculation and math fluency. Math goals related to demonstrating an understanding of concepts and formulas for determining measures, completing basic math facts, and solving real world problems. (P-35 @ 233)

24. For reading, the Student was described pursuant to the NWEA measure, the Woodcock-Johnson III, benchmark exams, and the DC-CAS. The Student was identified as needing specialized instruction in the areas of letter-word identification and reading fluency. Reading goals related to reading aloud, citing evidence in support of textual analysis, and determining the central idea. (P-35 @ 233-234)

25. For writing, the Student was described pursuant to the Woodcock-Johnson III. Writing goals were written in regard to planning, writing arguments to support claims, and writing “routinely over extended” time frames. (P-35 @ 235)

26. In terms of emotional, social and behavioral development, the Student was described as having anger and frustration and as being in denial when he is confronted with his own inappropriate behavior. Goals related to articulating his feelings and developing coping skills. (P-35 @ 236-238)

27. The IEP provided for 8 hours per week of specialized instruction inside general education, and 6 hours per week of specialized instruction outside general education. (P-35@ 240)

28. For the 2012-2013 school year, the Student started at School D and then transferred to School A. (Testimony of Witness B)

29. At School A, for the 2012-2013 school year, the Student had some behavioral incidents, including punching a glass and getting injured. He was very sensitive to adults and expressed strong feelings of anxiety. (P-21 @ 100)

30. An IEP meeting was held for the Student on April 9, 2013. The IEP identified the Student as having deficiencies in math, reading, and written expression. (P-34)

31. For math, the Student was described pursuant to the NWEA measure, the Woodcock-Johnson III, on benchmark exams, and on the DC-CAS. These indicators showed the Student to be well below level, with demonstrated areas of need in calculation and math fluency. Math goals related to knowing and applying the properties

of integer exponents to generate numerical expressions, graphing proportional relationships, and understanding about functions. (P-34 @ 217-218)

32. For reading, the Student was described pursuant to the NWEA measure, the Woodcock-Johnson III, benchmark exams, and the DC-CAS. The Student was identified as needing specialized instruction in the areas of letter-word identification and reading fluency. Reading goals related to citing textual evidence, determining the author's point of view, and determining the meaning of words and phrases. (P-34 @ 218-219)

33. For writing, the Student was described pursuant to the Woodcock-Johnson III. Goals related to writing arguments to support claims, and drawing evidence from literary or informational texts. (P-34 @ 219-220)

34. In terms of emotional, social and behavioral development, the Student was described as having anger and frustration and as being in denial when he is confronted with his own inappropriate behavior. Goals related to articulating his feelings and developing coping skills. (P-34 @ 221)

35. The "Present Level of Performance and Annual Goals" sections of this IEP are virtually identical to the "Present Level of Performance and Annual Goals" sections of the previous IEP (from June, 2012).

36. This IEP provided for specialized instruction in general education for 14 hours per week, and 1 hour of specialized instruction outside general education per week. Behavioral support services are recommended for 120 minutes per month. (P-34 @ 224)

37. IEP accommodations included repetition of instructions, simplification of oral directions, location with minimal distractions, and preferential seating. (P-34 @ 226)

38. Comprehensive testing was conducted on the Student in June, 2013 by Evaluator A. This testing revealed a Full Scale IQ of 72, with an 81 standard score on the Verbal Comprehension Index. (P-21 @ 105)

39. The Student did better on testing assessing his ability to process simple visual information quickly. (P-21 @ 105)

40. On the Woodcock-Johnson III Tests of Achievement, scores were in the 3rd to 5th grade level, with most scores putting the Student at a 4th grade level. These scores were below the expected performance for the Student. Passage comprehension was a relative strength, and the Student's knowledge of letter-sound relationships was deficient. (P-21 @ 106-107)

41. His broad writing abilities were equivalent to the 3rd grade range, and his academic fluency was very low. It took him a long time to do simple tasks. (P-21 @ 107)

42. BASC-2 testing from a then-current teacher, Teacher A, reported the Student having difficulties controlling behaviors, that he was easily irritated, had poor study skills, was disorganized, had difficulties with attention, did not turn in assignments on time, and had difficulty with communication. (P-21 @ 108-109)

43. Evaluator A diagnosed the Student with Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Presentation, Moderate; Other Specified Depressive Disorder (Depressive Episode with Insufficient Symptoms), Specific Learning Disorder,

with Impairment in Reading: Word Reading Accuracy; and Specific Learning Disorder, with Impairment in Writing, Grammar and Punctuation Accuracy and Clarity and Organization of Written Expression. (P-21 @ 110-111)

44. The evaluator recommended extended time, short breaks, small class size, individual tutoring, detailed instructions for assignments, breaking assignments into smaller assignments, use of an organizer, a behavior intervention plan, and individual therapy. (P-21 @ 112)

45. For the 2013-2014 school year, Petitioner wanted the Student to go to School B because it has a good reputation. (Testimony of parent)

46. School B is a charter school operating with DCPS as its Local Educational Agency. (“LEA”) (Testimony of Witness D)

47. Since School B is a charter school, they are independent in terms of providing education. However, DCPS is the LEA, and DCPS governs the special education department at the school. (Testimony of Witness D)

48. To apply to the school, a parent must fill out an application and provide residency information for the Student. Then they are notified if their child is accepted. School B will only find out if a student has an IEP if the parent discloses it. (Testimony of Witness D)

49. School B has been directed by the OSSE to refrain from asking the parents if a student has an IEP out of concern for discrimination against students with disabilities. (Testimony of Witness D)

50. Petitioner applied for the Student to attend School B for the 2013-2014 school year. After reviewing the application, School B accepted the Student. Petitioner

did not disclose to the school that the Student had an IEP. (Testimony of Petitioner; Testimony of Witness D)

51. The Student began at School B without receiving the services on his IEP. (Testimony of Witness D)

52. After the Student started at the school, the school found out that the Student had an IEP. A school representative told Petitioner that School B could not provide the services on the IEP. (Testimony of Witness D)

53. In particular, the school did not have the resources to provide specialized instruction outside the general education setting. (Testimony of Witness D)

54. Still, Petitioner did not want to pull the child out of school. As a result, the Student stayed at School B for the entire 2013-2014 school year. (Testimony of Petitioner)

55. During the 2013-2014 school year, the Student could be disruptive in class, he sometimes did not follow directions, he sometimes did not do his work, and on occasion had to be removed from the classroom. (P-28 @ 159-163)

56. The Student's attendance was inconsistent. On and off, he would miss days from school. Petitioner would bring documents to explain the absences. (Testimony of Witness C)

57. The IEP for the meeting dated March 19, 2014 identified the Student as having deficiencies in math, reading, written expression, communication/speech and language, and emotional, social and behavioral development. (P-32)

58. The March 19, 2014 IEP team reviewed progress reports, teacher summaries, current evaluations, and reviewed the evaluation by Evaluator A. Petitioner

did not object to any of the goals or language in the IEP, nor did the advocate.

(Testimony of Witness D)

59. For math, the Student was described pursuant to the ANET assessment as being below average. Three goals were written in regard to solving equations and inequalities, solving multi-step equations, and modeling functions. (P-32 @ 180)

60. For reading, the Student was described pursuant to a report card and the Achievement Network Exam. The IEP describes the Student as below basic in reading. Reading goals relate to citing textual evidence, determining the central idea, and determining the meaning of words. (P-32 @ 182-183)

61. For writing, the Student was described pursuant to the ANET assessment and classroom data. This established the Student as having difficulty in writing compared to peers. Writing goals were written in regard to planning revising and editing, writing arguments to support claims, and drawing evidence from literary or informational texts. (P-32 @ 183-184)

62. In terms of Communication/Speech and Language, pursuant to observations, the Student was described as functioning lower than peers in vocabulary development, concept development, formulating sentences, listening/reading comprehension and grammar sentence/completion. Goals related to synonyms, answering questions, and formulating grammatically correct sentences of increasing length and complexity. (P-32 @ 184-185)

63. In terms of Emotional, Social and Behavioral Development, the Student was described pursuant to records and observation as being disruptive, late for class, and given to walking out of class. Goals were written in regard to articulating and expressing

feelings, developing coping skills, and demonstrating positive self-esteem. (P-32 @ 185-187)

64. The IEP provides for 15 hours per week of specialized instruction outside general education, with behavioral support services for 240 minutes per month, and speech language pathology for 240 minutes per week. (P-32 @189)

65. IEP accommodations include repetition of instructions, simplification of oral directions, location with minimal distractions, and preferential seating. (P-32 @ 191)

66. The services were changed in the April 2014 IEP because the team felt the Student needed the instruction outside general education. (Testimony of Witness D)

67. At this meeting, Petitioner was told that School B could not provide the services on the IEP for the remainder of the year and for the 2014-2015 school year. Petitioner did not want to take the Student out of School B. (Testimony of Witness D)

68. For the 2013-2014 school year, the Student made some progress in math, but difficulties were evident since he did not pay attention and would fall asleep in class. Progress was reported in reading, but he was not able to perform simple tasks like using a dictionary and did not put forth good effort. No progress was reported in written expression. (R-3@ 007-0009)

69. In Emotional, Social and Behavioral Development, progress was noted in terms of expressing his thoughts and demonstrating self-awareness. (R-3 @ 009-010)

70. The Student's grades for 2013-2014 were F in every academic subject except Spanish. (P-30)

71. A BIP for the Student dated July 14, 2014 provided the Student with break passes, verbal reinforcement, and a points system. It was noted that he is very sensitive to disapproval and that simply withholding praise is sufficient to manage the Student's behavior. (R-6 @ 018-020)

72. For the 2014-2015 school year, the Student has had attendance issues at School B, including because of nosebleeds and asthma. (Testimony of Petitioner)

73. Witness C then asked Petitioner to document the nosebleeds and/or the asthma that were allegedly causing the absences. Documentation from the Student's doctor stated that the nosebleeds would last only 30 minutes, and that such a condition should not lead to an absence. Then the Student's attendance improved and tardiness was reduced. (Testimony of Witness C)

74. For the current school year, the Student is getting 15 hours a week of specialized instruction even though it is not on the IEP. (Testimony of Witness D)

75. The Student is repeating Algebra 1 and English this year since he failed them both last year. (Testimony of Student)

76. School C is a private day school with about 180 students. Teachers are all certified or in the process of being certified. The school offers behavioral support services, individual therapy, group therapy, Behavior Intervention Plans, token economy systems, and small class size. (Testimony of Witness A)

VII. Conclusions of Law

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

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

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

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

The appropriateness of an IEP is determined by considering two issues: first, whether the school district complied with the IDEA's procedural requirements and, second, whether the IEP was “reasonably calculated to enable the child to receive educational benefits.” Rowley, 456 U.S. at 206-207.

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. April, 2013 IEP.

Petitioner contends that, on this IEP, Respondent did not properly credit I.E.E.s, did not reference appropriate present levels of performance, did not write appropriate goals, and did not provide the Student with a full-time educational placement.

Respondent points out that this IEP was not a subject of the pre-hearing order, which states, in bold:

Both parties will be held to the matters agreed upon and/or set forth in this Order. If either party believes this Hearing Officer has made any misstatements or omissions, the party shall advise this Hearing Officer in writing within three business days of the date of this Order (and contemporaneously provide a copy to opposing counsel and the Student Hearing Office). This Hearing Officer will promptly address all duly raised concerns.

The Due Process Complaint does reference this IEP meeting, at pages 2, 8, 10 and 12. However, most of the Complaint involves other meetings, and the complaint does not specifically indicate that Petitioner was bringing a FAPE claim based on the April meeting. Given the vagaries of the Complaint, it was incumbent upon Petitioner to clarify this contention at the prehearing conference. Petitioner did not, and then did not object when the prehearing order was issued without reference to this IEP.

The main function of the prehearing conference is to provide notice to the parties and to clarify issues so that the parties are well prepared for litigation. DCPS makes a fair point when it argues there was inappropriate notice of this claim. Under the circumstances, I find that I do not have jurisdiction over this claim, which is dismissed without prejudice.

2. Other Meetings.

Petitioner contends that DCPS failed to provide the Student with an appropriate IEP on the following dates: September 23, 2013; October 16, 2013; January 16, 2014, and June 6, 2014.

As pointed out by Respondent, there were no IEP meetings on these dates. Meetings were apparently held on these dates, but Petitioner's complaint misidentifies these meetings as IEP meetings. Again, it was incumbent upon Petitioner to clarify these claims at the prehearing conference. Again, the main point of the prehearing conference is to provide notice to the parties so that the parties are well prepared for litigation.

To the extent that Petitioner is now claiming that Respondent failed to revise the existing IEP at these meetings, I find that I do not have jurisdiction over these issues. I will note that Petitioner's post-hearing submission does not reference these meetings at all, and does not claim that Respondent failed to revise the existing IEPs during the 2013-2014 and 2014-2015 school years. Under the circumstances, these claims should be dismissed, again without prejudice.

3. March 19, 2014 IEP.

Petitioner contends that, at the March 19, 2014 IEP meeting, Respondent did not properly credit I.E.E.s, did not write appropriate present levels of performance, did not write appropriate goals, and did not provide the Student with a full-time educational placement.

Petitioner argues that this IEP did not credit Evaluation A's report, which is accurate. School District are required to review existing evaluation data, including evaluations and information provided by the parent of a Student. 34 CFR Sect. 300.305(a)(1)(i). While there is testimony that Evaluator A's report was considered, the

IEP does not evidence that. The “Present Level of Performance” section of the IEP references other testing but none of Evaluator A’s thorough testing. In terms of math, the Student was described pursuant to the ANET assessment. In terms of reading, the Student was described pursuant to a report card and the Achievement Network Exam. In terms of writing, the Student was described pursuant to the ANET assessment and classroom data. There is no explanation in the record as to why Evaluator A’s report was not referenced in the IEP.

Still, while I found Evaluator A’s report to be well-written, Petitioner does not clearly point out why the failure to credit her report was a denial of FAPE. The description of the Student in the report is very similar to the description of the Student in the IEP. An IDEA claim is viable only if violations affect the student's substantive rights. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 834 (D.C.Cir.2006); Smith v. District of Columbia, 2010 WL 4861757 (D.D.C. 2010); Holdzclaw v. District of Columbia, 524 F.Supp.2d 43, 48 (D.D.C.2007); Kruvant v. District of Columbia, 99 Fed. Appx. 232, 233 (D.C. Cir.2004). While there are some recommendations in the report that were not placed on the IEP, i.e., detailed instructions for assignments, other recommendations are incorporated in the IEP, including the need for a self-contained classroom and the need for breaks. I am not convinced that the failure to include certain of Evaluator A’s recommendations in the IEP rises to the level of FAPE denial. Under the circumstances, Respondent’s failure to credit Evaluator A’s report should not result in a finding of FAPE denial here.

In regard to goals, the record reveals that the IEP team created new goals for the Student in all areas of concern. There are three goals in math, reading, speech and

language, and social/emotional issues, with two goals in writing. There is nothing in the record to indicate or suggest that the goals were inappropriate, not measurable, or not specific enough. Evaluator A's testimony did not focus on the goals, and Petitioner's closing argument also did not focus on IEP goals, which I find to be appropriate.

Petitioner also contends that the Student requires a full-time special education placement, i.e., that the Student requires placement in an environment that is outside general education for the entirety of the school day.

The record indicates that the Student has significant academic concerns. This seventeen year old is functioning well below grade level. Evaluator A's 2013 report indicated that the Student was approximately at the fourth grade level in academics, and there is no reason to believe that the Student has made any significant strides since then. The record indicates that the Student is distractible in class, and that he requires a small class size in academic subjects to address his ADHD issues, his processing issues, his memory issues, and his behavioral concerns. Still, the record also indicates that the Student has not tried to function in a setting where his academic instruction is provided in a small class setting. The March, 2014 IEP provides for 15 hours of specialized instruction outside the general education setting, and it is fair to deduce that those hours are to be provided in a small class setting. There is nothing in the record to establish that the Student requires specialized instruction in all non-academic subjects. Given the IDEA mandate to provide Students with a FAPE through the Least Restrictive

Environment (“LRE”), I find it was reasonable for Respondent to have proposed this level of service.²

In sum, I find that the March 19, 2014 IEP was appropriately formulated and reasonably calculated to provide the Student with educational benefit.

4. Location of Services Claims.

Petitioner contends that the Student was at an inappropriate location of services, School B, which could not implement his IEPs for the 2013-2014 and 2014-2015 school years.

Courts hold that school districts may designate schools for students as long as the District assigns a school that may appropriately implement a Student’s IEP. T.Y. v. New York City Department of Educ., 584 F.3d 412 (2d Cir. 2009). FAPE denial may result where a school’s implementation of an IEP was materially flawed. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)

The record establishes that School B could not implement the Student’s IEP for the 2013-2014 and 2014-2015 school years. School B is an “inclusion” school which does not offer specialized instruction outside the general education setting.

I find that this failure to provide services materially prejudiced the Student in both school years. The Student has received none of his special education hours outside general education for the 2014-2015 school year. The Student only required one hour a week of specialized instruction outside of general education for 2013-2014. However,

² Maintaining a less restrictive placement at the expense of educational benefit is not appropriate or required. C.L v. Scarsdale Union Free Sch. Dist., 2014 WL 928906 at *8-*12 (2nd Cir. March 14, 2014); Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

the Student's grades for 2013-2014 were F in all academic subjects. While there was some reported progress on goals, the record on the whole suggests that the Student was performing inadequately at School B and needed, at the very minimum, every service that the IEP offered.

I will point out that no witnesses from Respondent suggested that School B was appropriate for the Student in either school year, and Respondent does not argue that School B provided the Student with a FAPE. Instead, Respondent argues that the fault lies with Petitioner. Respondent points out that Petitioner failed to inform the school that the Student even had an IEP when enrolling the Student in 2013. Respondent points out that Petitioner then kept the Student at the school even after she learned the school could not implement the IEP, and that Petitioner continues to keep the Student at School B even though it is a different school year now.

Respondent also points out that, pursuant to OSSE directive, it cannot ask parents whether applying students have an IEP. Respondent adds that, pursuant to OSSE directive, it cannot force students to leave a school even if the school is unable to implement the IEP.

I am somewhat sympathetic to the Respondent's position. Certainly, the parent bears some responsibilities for the failure of School B to provide this Student with a FAPE. However, I am not aware of any authority to support Respondent's position that an LEA charter school can avoid liability under IDEA if the parent chooses to put the Student in the school even though it is inappropriate.

The DCMR specifically addresses this issue. According to the DCMR, "(i)f an LEA charter anticipates that it may be unable to meet its obligation to provide a FAPE to

a child with a disability currently enrolled in its school” then the LEA charter must “contact the OSSE for technical assistance regarding the provision of FAPE to the child within the LEA Charter.” 5-E DCMR Sect. 3019.8(b)(1) The OSSE can then make a recommendation regarding the ability of the LEA Charter to provide FAPE. 5-E DCMR Sect. 3019.8(b)(4) The OSSE may then make a location assignment for the placement of the child, with an opportunity for input from the parents. 5-E DCMR Sect. 3019.(b)(5-7)

School B and DCPS should have employed this approach rather than leave the Student in his current placement during the last two years. I will point out that the parent in this case has no apparent background in providing educational services and is in no position to dictate the educational placement of her child without assistance from educational professionals.

As a result of the foregoing, I find that Respondent denied the Student a FAPE by failing to implement the Student’s IEPs while the Student was attending School B.

VIII. Relief

As a remedy, Petitioner asserts that appropriate relief in this matter is to order placement at School C and compensatory education.

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

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

unique needs.

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

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.

As noted by Evaluator A, the Student is not achieving on the level that should be expected of him given his cognitive potential. However, the record also indicates that the Student has not attended small, self-contained special education classes. The Student has been in a large class setting with other general education students. The record indicates that this setting is too fast paced for him, makes it difficult for him to process information, and leads to attentional and behavioral issues.³ While School C provides

³ While differentiation of instruction can presumably address this issue to some extent, it is hard for this IHO to understand how a seventeen year old Student who functions on a fourth grade level can truly keep up with class with other seventeen year olds who are functioning at grade level, even in an inclusion setting .

some the interventions that the Student requires, including small class size and behavioral supports, the main intervention – academics in a small special education class – is something that the Student has not tried in a public school. I agree with Respondent that it would be imprudent at this point to simply take the Student from general education to a full-time setting without implementing the current IEP first. This IEP, which provides for 15 hours of specialized instruction per week outside general education, would provide for exposure to general education peers in non-academic classes, lunch, and physical education.

Petitioner also seeks compensatory education for the period of FAPE denial. 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 seeks one hour of tutoring for a calendar year as compensatory education. While no compensatory education plan was presented in this case, and Petitioner did not specifically apply the Reid factors here to calculate the appropriate award, I find this a reasonable award given my years of experience as a Hearing Officer. I will point out that the Student has been denied a FAPE for well over a school year, and that fifty-two hours of instruction constitutes less than two full weeks of instruction for a student in DCPS schools.

X. Order

As a result of the foregoing, I hereby order the following:

1. The IEP team shall convene within twenty days of the issuance of this HOD to recommend a location of services that can implement the Student's current IEP;
2. The Student shall receive one hour of compensatory tutoring per week for a 52 week period. Tutoring shall be provided in academic subjects by a certified special education teacher;
3. Petitioner's claims relating to the April, 2013 IEP are dismissed without prejudice;

4. Any claims that Respondent failed to revise the Student's IEP on September 23, 2013, October 16, 2013, January 16, 2014, and/or June 6, 2014 are dismissed without prejudice;

5. Petitioner's other claims are dismissed with prejudice.

Dated: December 16, 2014

Michael Lazan
Impartial Hearing Officer

X. Notice of Appeal Rights

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

Date: December 16, 2014

Michael Lazan
Impartial Hearing Officer