District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	**Room: 2008 (7/8), 2006 (7/22)**
Petitioner,	)	**Hearing: July 8 and 22, 2016**
	)	**HOD Due: July 26, 2016**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2016-0120**
District of Columbia Public Schools,	)	**Issue Date: July 26, 2016**
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with Emotional Disturbance. (the "Student")

A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") from Petitioner (or, the "parent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on May 12, 2016 in regard to the Student. On May 17, 2016, Respondent filed a response. A resolution meeting was held on May 27, 2016. The resolution period expired on June 11, 2016.

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 and must be removed prior to public distribution.

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

III. Procedural History

This case was filed as an "expedited" case, as designated by Petitioner. However, the case does not involve any claims relating to discipline. The request to expedite was pursuant to the Standard Operating Procedures for the Office of Dispute Resolution, Section 1008(A)(B). Petitioner then withdrew this request. An Order on Timelines issued on June 9, 2015, memorializing that withdrawal.

On June 8, 2016, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order issued on June 13, 2016, summarizing the rules to be applied in this hearing and identifying the issues in the case. "Child Find" claims were specifically withdrawn by Petitioner at the prehearing conference.

There were two hearing dates in this case, July 8, 2016, and July 22, 2016. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved in Exhibits 1-27. There were no objections. Exhibits 1-27 were admitted. Respondent moved into evidence Exhibits 1-43 and 45-48. Petitioner objected to Exhibits 2-6 on relevance grounds. These objections were overruled. Exhibits 1-43 and 45-48 were admitted.

At the close of testimony, both sides presented oral closing statements.

Petitioner presented as witnesses: Petitioner; Student; Witness A, an advocate; Witness E, a representative of School C; and Witness B, a psychologist. Respondent presented Witness C, a psychologist, and Witness D, a Special Education Coordinator.

IV. Credibility.

In this case, most witnesses were credible and consistent with each other, though I did feel that the Petitioner's testimony was inconsistent and confusing at times. For instance, with respect to the Student's attendance at School B, at some points in the record, Petitioner indicated that the Student had not attended School B because the Student was denied entry into the school. Later, Petitioner clearly stated that the Student had attended School B on and off during the 2013-2014 and 2014-2015 school years.

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 develop an appropriate Individualized Education Program ("IEP") on March 8, 2016? If so, did DCPS violate 34 CFR Sect. 300.320, 34 CFR Sect. 300.17, 34 CFR Sect. 300.324, and act in contravention of some of the principles in such cases as Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Petitioner contends that the Student requires "full-time" special education services in a stand-alone school. Petitioner contends that the Student's IEP lacks sufficient specialized instruction, provides an incorrect disability classification for the Student, provides inappropriate and insufficient goals, provides inappropriate and insufficient transition services/plan, and does not contain an adequate statement of LRE.

2. Did DCPS fail to provide an appropriate placement for the Student in connection to the IEP meeting on March 8, 2016? If so, did DCPS act in contravention

of some of the principles in such cases as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioner contends that the placement at School B is inappropriate.

As relief, Petitioner seeks tutoring and counseling, a vocational program, placement at School C, and an assessment regarding the Student's transition services.

VI. Findings of Fact

1. The Student is a X year old who is currently eligible for services as a student with Emotional Disturbance. (R-39)

2. The Student has a difficult personal history beginning in the year 2009, when the Student was violently attacked at [redacted] School A. The Student was beaten by a group of approximately twenty students and the Student's jaw was broken. The Student's mouth was wired shut for a year. After the incident, the Student's behavior changed, including sleep patterns, speech, and memory. (Testimony of Witness B; Testimony of Petitioner. P-5-3; P-6-8)

3. The Student was tested in or about March, 2010 by Psychologist A. The Student's standardized testing scores showed a full scale IQ of 91, in the average range. Academic testing in reading was in the average range, with weakness in fluency. The Student also tested in the average range in math and in writing. (P-5-6-8)

4. In or about 2012, the Student was again assaulted, this time by a violent neighbor. This neighbor punched the Student several times in the head. (P-18-2)

5. In or about March, 2013, testing was conducted of the Student by a psychologist from the Superior Court of the District of Columbia, Family Court Social Services Division, Child Guidance Clinic. The Student's testing in memory and learning

revealed borderline, impaired and low average scores, with general memory tested at the second percentile. This represented a significant decline from previous testing. The Student was diagnosed with Cognitive Disorder NOS, Anxiety Disorder Due To Brain Injury with Generalized Anxiety, Mood Disorder Due to Brain Injury with Depressive-Like Episode, and Post Traumatic Stress Disorder by history. (P-6-9)

7. The Student did not regularly attend school during this time. The Student received only 1.5 credits for the 2010-11, 2011-2012, 2012-2013, and 2013-2014 years combined. (P-18-12; P-11; Testimony of Petitioner)

8. During parts of the 2013-2014 and 2014-2015 school years, the Student attended School B. The Student received a Section 504 plan at School B in January, 2014 which was based on the specific disability of "post-traumatic stress syndrome." This plan provided the Student with classroom accommodations such as priority seating, extra time, breaking assignments into smaller units, and frequent breaks. (P-8)

9. At a certain point during the 2014-2015 school year, there was an incident where the Student was denied entry into the school, resulting in the Student getting handcuffed. (Testimony of Petitioner; Testimony of Student; Testimony of Witness A)

10. Throughout the Student's time at School B, the Student felt fearful at the school, feeling that the environment was similar to that of School A, where the Student was attacked. (Testimony of Petitioner; Testimony of Student; Testimony of Witness A)

11. For the 2015-2016 school year, the Student has refused to attend School B. (Testimony of Student)

12. On October 16, 2015 an eligibility meeting took place. At the meeting was a DCPS psychologist, Witness C, who was not able to test the Student in May, 2014.

At that time, Witness C determined that the Student was purposely making erroneous responses. The team decided that the Student was ineligible for services. (P-9-5; P-16; P-19-4)

13. A Due Process Complaint was filed on October 19, 2015, alleging FAPE violations for every school year going back to the 2010-2011 school year. The Due Process Complaint alleged that DCPS unlawfully exited the Student from special education in the 2010-2011 school year and inappropriately offered no program or placement since then. Petitioner also contended that DCPS did not evaluations that were due the Student. The matter was assigned to IHO Peter Vaden. (R-41-2)

14. A neuropsychological evaluation was conducted of the Student by Evaluator A in November, 2015. In this testing, the Student had a difficult time. The Student did not understand what was being asked on some subtests, directions had to be read several times, and the Student made errors on simple directives. For instance, when asked to spell a word, the Student instead gave a synonym. The Student seemed to be in a "fog," which was different than the Student appeared to Evaluator A in 2010. In terms of actual scores, the Student tested at an extremely low level in all domains. Broad reading, math, and writing standard scores were less than 40, "very low." Testing in regard to memory and learning produced scores ranging from below average to well below average. The Student was diagnosed with Post Traumatic Stress Disorder, with Dissociative Symptoms, and Major or Mild Neurocognitive disorder due to Traumatic Brain Injury. (P-18)

15. On December 29, 2015, IHO Vaden issued an HOD finding that "Child Find" had been violated and ordered an independent evaluation to determine whether the

Student was a student with a disability and if so, the amount of time that the impairment has been present. He denied the request for prospective placement and compensatory education without prejudice. (R-41)

16. An evaluation was conducted by Witness B of the Student in January, 2016. This evaluator noted that the Student was easily confused and discouraged with the testing, and was embarrassed about difficulties with the tests. The Student frequently required repetition, had poor attentional skills, and was not alert. The Student frequently misinterpreted visual stimuli and perseverated, a trait that is common to individuals with brain trauma. The Student was found to be on the .1 percentile on most intelligence measures, had impaired to borderline scores in attention and executive functioning, and had impaired scores in memory. Academic testing showed very low scores, with oral reading in the first percentile, math at the .1 percentile, and writing at the .1 percentile as well. (P-19)

17. Witness B's report indicated that the Student should be deemed to have had Traumatic Brain Injury as of March, 2013 based on her review of the documents and an evaluation of the Student. She recommended that the Student receive education in a small setting with a lower staff to student ratio than the typical regular education [redacted] school. She indicated that the Student needed a supportive environment, and access to counseling. She diagnosed the Student with Post Traumatic Stress Syndrome and Traumatic Brain Injury. (P-19-21-22; P-21)

18. An eligibility/IEP meeting was held on March 8, 2016. The team determined that the Student was eligible as a student with emotional disturbance. DCPS would not classify the Student as a student with Traumatic Brain Injury because their

guidebook stated that documentation from a medical doctor was necessary for such a classification. The team then worked on the IEP. The parent did not disagree with the IEP, but when the team recommended School B, the parent disagreed. The parent was upset that the school did not let the Student enroll at one point and handcuffed the Student. She also was concerned that the Student would be grouped with children ages of [redacted] and [redacted] and that this was degrading to the Student. The parent asked for an alternative placement at the meeting, but DCPS refused. (Testimony of Witness A; Testimony of Witness C; Testimony of Witness D; Testimony of Petitioner)

19. After the meeting ended, DCPS told the parent and Student that they said they needed a vocational assessment to be done. As a result, the parent and Student remained and the Student took two vocational assessments. (Testimony of Witness A; Testimony of Witness C)

20. The IEP contained goals in mathematics, reading, written expression, emotional, social, and behavioral development, with 16 hours per week of specialized instruction outside general education, and 120 minutes a month of behavioral support services in general education. Preferential seating and small group testing were recommended. "Possible" supplemental aids and services are listed for the general education environment, including cooperative learning groups, preteaching, repeating directions, extra examples and non-examples, and preferential seating arrangements (R-39)

21. The Post-Secondary Transition Plan in the IEP relies on the WIAT-III assessment, an O*Net interest profiler, an independent living assessment through the Casey Life Skills tool. There are transition goals in terms of researching colleges, using

contacts and interviewing, and creating a budget. Transition services are a total of ten hours per year on researching schools and careers. (R-39-13-15)

22. School B was planning for a safety plan for the Student for 2015-2016 school year, which included having an employee meet the Student at the school every day. The Student would have received English, Math, Science, and Social studies in self-contained classes for ninety minute blocks two or three times a week. There were between twelve to fifteen children in each class, with one teacher and one teacher's assistant. The Student also would have taken electives such as art and music, a career class, and also reading intervention. (Testimony of Witness D)

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-EDCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

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

1. Did DCPS fail to develop an appropriate Individualized Education Program ("IEP") on March 8, 2016? If so, did DCPS violate 34 CFR Sect. 300.320, 34 CFR Sect. 300.17, 34 CFR Sect. 300.324, and act in contravention of some of the principles in such cases as Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Petitioner contends that the Student requires "full-time" special education services in a stand-alone school. Petitioner contends that the Student's IEP lacks sufficient specialized instruction, provides an incorrect disability classification for the Student, provides inappropriate and insufficient goals, provides inappropriate and insufficient transition services/plan, and does not contain an adequate statement of LRE.

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must be determined as of the time it was offered to the student. Citing to Circuit court decisions, the Court found that an IEP should be judged prospectively to avoid "Monday morning quarterbacking." See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

The role of the hearing officer is to determine if the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982) The IEP should be both comprehensive and specific and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B) (the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child).

Petitioner's closing argument focused on the fact that several psychologists, including Witness B, contended this Student needs a "full-time" therapeutic placement in view of the Student's difficulties associated with Traumatic Brain Injury ("TBI"). She also objected to the failure to determine that the Student was eligible for services at a Student with TBI, contending that no medical note is needed for such a determination. She argued that students with Traumatic Brain Injury need certain qualities in a classroom that are not recommended by this IEP. She also argued that the goals were insufficient, that the transition plan was insufficient, and that the IEP was procedurally inadequate with respect to LRE.

Petitioner's argument here does not acknowledge the fact that this is a Student who has never attended any classes in a self-contained special education setting. Notwithstanding low academic levels, the Student was only determined to be eligible for services in March, 2016. In fact, it appears that the Student has never received any special education instruction in any setting, much less a full sixteen hours of instruction outside general education. It is true that the Student would receive "specials" in general education, but there is nothing in the record to clearly establish that the Student would be inappropriately placed in general education classes for "specials" such as music and art. There is also nothing in the record to establish that the Student requires more than sixteen hours of academic instruction per week, or that more "academic" hours are required pursuant to law or regulation. What is clear is that a school district must place a student in their least restrictive environment, and for this Student, it is reasonable to posit that such an environment was a school with at least some general education students in March, 2016, when he was just entering special education.

However, I do agree that the IEP does not provide any accommodations to make sure that the school location to be selected is appropriate. Witness B testified that, as a result of the Student's traumatic brain injury, the Student has a sensitively to light and sounds, and that the level of stimulation in the Student's environment has to be controlled for the Student to feel safe. There is nothing in the IEP to even acknowledge that the Student suffered a traumatic brain injury in 2009 and 2012, and the IEP certainly does not address the Student's need to feel safe. The Student's emotional issues are touched on in a superficial way, and the only services that are recommended are behavioral support services, i.e. counseling. There is nothing in the record to suggest that thirty minutes per week of counseling was going to make the Student feel safe at a school that the Student might otherwise consider unsafe.

I also agree with Petitioner that the Student could have been determined to be eligible for services as a student with TBI. The relevant provision of the C.F.R. states:

> Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial disability or psychosocial impairment or both, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasons; abstract thinking; judgment; problem solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative or to birth injuries induced by birth trauma.

34 C.F.R. Sect. 300.308(c)(12)

There is no real dispute that the Student fits into the criteria for this classification. As is clear from the Student's testimony, Petitioner's testimony, the testimony of Witness

B, the report of Witness B, the report of Evaluator A, and the report of the Family Court, this is a young person who has unfortunately lost a significant amount of academic functioning as a result of two different attacks suffered in 2009 and 2012. While the Student was formerly in the average range in most academic areas, now the Student is difficult to test at all since the Student has trouble understanding directions. When scores are compiled, the testing shows that the Student is at the very lowest range of functioning, a drastic decrease from earlier testing. I agree with Witness B and the other psychologists that this decrease is due to the violence that the Student suffered in 2009 and 2012.

DCPS contended that a medical note is required for a student to be determined to be eligible as a Student with TBI. However, there is no such language in the regulations, and DCPS has presented me with no authority in support of this position. I will note that Witness B testified that a neuropsychologist can diagnose TBI, and that Evaluator A conducted a "neuropsychological" evaluation of the Student (and did diagnose the Student with TBI). DCPS also argued that a medical note is needed because the Student's injuries might be congenital or degenerative or to birth injuries induced by birth trauma, which are the exceptions enumerated in the regulation. However, the injuries here were clearly not congenital or induced by birth trauma, and there is nothing in the record to hint at any "degenerative" condition of the Student. I will accordingly order a change to the Student's disability classification to incorporate the Student's status as a student with TBI.[2]

[2] Petitioner did not present any testimony in support of the position that the Student should not be determined to be eligible as a student with Emotional Disturbance. As a result, it is appropriate to find that the Student is eligible as a Student with Multiple Disabilities.

Petitioner's other arguments are less compelling. Petitioner argued that the Student's goals were inappropriate, pointing to the transition plan. Petitioner contended that the transition goals were too few. Petitioner also argued that the transition plan was generally inappropriate, criticizing DCPS's choice of assessments as superficial and the fact that the plan only requires a limited amount of time for services.

Transition Services are defined as "a coordinated set of activities for a child with a disability" that is a "results oriented process" that is "based on the individual child's needs." 34 CFR Sect. 300.43. The focus of transition services is to "improve the academic and functional achievement of a child with a disability, to facilitate the child's movement from school to post-school activities." Id. Services must be "based on an individual child's needs, taking into account the child's strengths, preferences and interests" and includes instruction, related services, community experiences, employment and other post-school adult living objectives, and "if appropriate" acquisition of daily living skills and provision of a functional vocational evaluation. Id.; see also 71 Fed. Reg. 46579 (2006)(definition of transition services is written broadly).

Beginning when the Student is 16, or younger if determined to be appropriate by the IEP team, the IEP must include appropriate measurable post-secondary goals based upon appropriate transition assessments relating to training, education, employment, and where appropriate independent living skills. 34 CFR Sect. 300.320(b); see 20 U.S.C. Sect. 1414(d)(1)(A)(i)(VII).

DCPS exercised reasonable discretion with respect to this transition plan, which does reflect two vocational assessments that require the Student to answer questions. There is no requirement for assessments to inquire more "deeply" into the Student's

skills, as Witness A suggests. There is also no requirement for transition plans to have a specific number of hours or goals, as Witness A also suggests. On the whole, the plan details the Student's responses to the questions on the O*Net Interest Profiler and the Casey Life Skills assessment and puts forth three separate goals in job search, post-secondary education search, and daily living skills. The plan also identified a particular field for the Student, electrical repair/aviation tech. While much of the language in the plan is generic in nature, the Student did not testify at all about how the transition plan was inadequate. I will note that a defective transition plan is ordinarily considered a procedural violation that does not amount to denial of a FAPE. Patterson v. District of Columbia, 965 F.Supp.2d 126, 131 (D.D.C. 2013)

Finally, Petitioner contends that the IEP's LRE statement is inappropriate, citing to a recent case decided by Judge Lamberth. Brown v. District of Columbia, No. 15-0043 (RCL), 2016 WL 1452330 (D.D.C. April 16, 2016) However, in Brown, there was apparently no statement in the IEP describing how the recommended placement constituted the Student's LRE. Here, the IEP does contain an LRE statement, on page 9. The educational placement is described and "possible" supplemental aids and services are listed for the general education environment, including cooperative learning groups, preteaching, repeating directions, extra examples and non-examples, and preferential seating arrangements. There is no testimony that the LRE statement in the IEP had any impact on the Student's right to a FAPE or the parent's right to participate in the IEP meeting.

Still, I find that the Student's IEP was defective because it did not accommodate the Student's needs in connection to TBI. The Student was therefore denied educational benefit, and a FAPE.

2. Did DCPS fail to provide an appropriate placement for the Student in connection to the IEP meeting on March 8, 2016? If so, did DCPS act in contravention of some of the principles in such cases as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Most cases involving FAPE denial focus on the IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). Nevertheless, Petitioners may bring claims based upon an inappropriate placement[3] in certain situations. Although the LEA has some discretion with respect to school selection,[4] that discretion cannot be exercised in such a manner to deprive a Student of a FAPE. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988). Courts can accordingly rule that school assignments violate the IDEA if, for instance, the school contains an environment that allows bullying. Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004)(denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of his perceived effeminacy); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005)(if a teacher is deliberately indifferent to the teasing of child with a disability and the abuse is so severe that the child can derive

[3] As pointed out in Eley v. District of Columbia, 47 F. Supp. 3d 131 (D.D.C. 2014), the Student's educational placement includes the school, or location of services.

[4] See Jalloh v. District of Columbia, 968 F.Supp.2d 203 (despite complaints about, among other things. the school's use of computers for instruction, school deemed able to implement the IEP and placement claims denied).

no benefit from the services that he or she is offered by the school district, the child has been denied FAPE).

There is no dispute that the student was emotionally and physically harmed by violence at School A, a large public [redacted] school, in 2009. This violence, which involved an attack so violent the Student's jaw was shut for about a year, started a decline in the Student's school attendance which continues to this day. A reason for this decline is the Student's reticence to attend a school that is similar to School A. This is the persuasive testimony of Witness B, as backed up by the evaluation of Evaluator A and the impartial evaluation of a psychologist from Family Court.

There is persuasive testimony in the record is that that School B is similar to School A in that it is a school with a large amount of children and a fairly loud environment. This is the testimony of the Student, who feels unsafe at School B. This problem was likely exacerbated by the incident when the Student was handcuffed at School B, which made the Student feel "violated." After this incident, the Student appears to have become even more reticent to go to school, and the Student did not attend for the 2015-2016 school year.

DCPS suggested that the Student's absences were the Student's own fault, but I agree with Petitioner that the Student is not simply refusing to go to school. Given the Student's history of being attacked, and the Student's history of being arrested at School B, the Student's fear of attending school is real. DCPS should have offered the Student a different school with a limited number of students and a relatively calm, safe environment to implement the IEP dated March 8, 2016. DCPS therefore denied the

Student educational benefit, and therefore a FAPE, through its placement decision after the issuance of the March 8, 2016 IEP.

VIII. Relief

As relief, Petitioner seeks placement at School C and compensatory tutoring and counseling.[5]

School C

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.

[5] Petitioner's other requested relief relates to the transition plan in the IEP, which I found to be appropriate. I will accordingly not consider relief relating to the transition plan.

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.

In this case, Petitioner argued, in essence, that the Student needs a small school that has a calm atmosphere. In particular, Petitioner argued that the Student needs a setting that is distinct from the setting at School A, where the Student was attacked. On this record, I would have to agree with this argument.

However, I do not agree that a private placement is necessarily the only option for a student like this, as Witness B assumes. There is nothing in the record to suggest that this kind of placement cannot be found in the public school system. There is no one "public school" option. Any public school system can and must have a wide range of school options, and there was no clear testimony to the effect that every single [redacted] school in the District of Columbia public school system is large, loud and similar to School A. Moreover, this student has never been in a special education program at DCPS. It is appropriate to first try special education classes at a smaller, calmer, appropriate public school before concluding that this Student must be educated in a highly restrictive private school with no general education peers.

While School C has some appropriate features, such as a very small class size, there was not much specific testimony about how School C is a calm and quiet environment. In fact, Witness E testified that there are some very difficult children at the

school who have caused significant disturbances. Though these students were not in the classroom that would be designated for the Student, Petitioner's argument against a public school for the Student suggests that he would be disrupted by students both inside and outside the actual assigned classrooms. There is also testimony from Witness E that the curriculum at School C is in part computer-based, which would not appear appropriate for the Student because Witness A testified that the Student did not "know computers." As a result, rather than order placement at School C, I will instead order DCPS to place the Student in a school that: 1) is small, with no more than 250 students in the building; and 2) is able to provide both instruction in a location with minimal distractions (both inside and outside the classroom), including minimal exposure to noise and disruption.[6]

Compensatory Education

Petitioner also asserted the need for compensatory education in this case. 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

[6] Though Witness A also pointed out that the Student needs to be placed in a classroom with children of the same age, I find that the record does not support this contention. In particular, I find it compelling that the Student did not testify that the age of students in classes mattered.

based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student").

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

Petitioner presented a compensatory education plan, Exhibit 23, which recommends 550 academic hours of compensatory education. However, this plan relates to the time period going back two full years, which is not at case here. In this case, the FAPE violation is from March 8, 2016 to present. As a result, I must calculate relief based on this four month-plus period of time.

I agree with the plan that this Student requires compensatory education in reading (comprehension, phonemic awareness, phonics, fluency, vocabulary, spelling, and writing) and math (calculation, fluency and reasoning) to make up for the FAPE denial period. To adjust the amount of services to the period of FAPE deprivation, I will accordingly reduce the award of compensatory academic tutoring to 75 hours, to be provided by a certified special education teacher selected by Petitioner.

Finally, in regard to the request for compensatory counseling, this request was not mentioned by Petitioner in the opening or closing statements, or in the compensatory education plan. Still, the Student was denied counseling over the last four or so months because of an inappropriate IEP and school assignment, and the Student should receive

compensatory counseling to make up for that deprivation. I will accordingly award the Student ten hours of compensatory counseling services, to be provided by a licensed private social worker at the provider's usual and customary rate, as selected by Petitioner.

IX. Order

As a result of the foregoing:

1. Respondent is deemed to have denied the Student a FAPE;

2. An IEP team shall meet within fifteen calendar days and revise the IEP to insure that the Student IEP is implemented at a small school with less than 250 students in the building. Such school must be able to provide instruction in a location with minimal distractions, both inside and outside the classroom, including minimal exposure to noise and disruption;

3. At such IEP meeting, the team will invite DCPS staff that are authorized to designate a specific school for the Student. At the meeting, the IEP team will classify the Student as a student with Multiple Disabilities, designate a school for the Student, and place the school on the Student's IEP;

4. Petitioner is hereby awarded 75 hours of compensatory academic tutoring, to be provided by a certified special education teacher of Petitioner's choice, in reading and/or math. The teacher shall be paid at a rate that is usual and customary for tutors in the District of Columbia;

5. Petitioner is hereby awarded 10 hours of compensatory counseling, by a licensed social worker of Petitioner's choice. The social worker shall be paid at a rate that is usual and customary for social workers in the District of Columbia;

6. Petitioner's other requests for relief are hereby denied.

Dated: July 26, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief 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: July 26, 2016

Michael Lazan
Impartial Hearing Officer