District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, N.E., Third Floor, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearing Dates: 9/18/19, Room 111;**
	)	**9/19/19, Room 111; 9/23/19, Room**
	)	**111.**
	)	**Hearing Officer: Michael Lazan**
District of Columbia Public Schools,	)	**Case No. 2019-0156**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Multiple Disabilities (the "Student"). 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 June 19, 2019. The Complaint was filed by the parent of the Student ("Petitioner"). On June 27, 2019, Respondent filed a response. The resolution period expired July 19, 2019.

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 Education Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 CFR 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

A prehearing conference was held on August 26, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on September 3, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was modified on September 3, 2019. The original Hearing Officer Determination ("HOD") decision date was September 2, 2019. On September 1, 2019, this Hearing Officer signed a continuance order upon the application of Petitioner, extending the decision date in this matter to September 28, 2019.

The hearing proceeded on September 18, 2019, and continued on September 19, 2019. Closing arguments were presented, on the record, on September 23, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-27. Objections were filed in regard to exhibits 1, 2, 16, 24, 25, 26, and 27. Objections were sustained in regard to exhibits 1 and 16. Exhibits 2-15 and 17-27 were admitted. Respondent moved into evidence exhibits 2-33. Though objections were filed, there were no objections made at the hearing. Exhibits 2-33 were admitted.

Petitioner moved for stay-put relief by motion dated July 9, 2019. Respondent submitted opposition papers to the motion on July 15, 2019. Petitioner submitted a reply on July 18, 2019. An order was issued on August 6, 2019, granting the motion for stay-put relief. Petitioner presented as witnesses: herself and Witness C, the Program Director

of School B. Respondent presented as witnesses: Witness B, the DCPS Non-Public School Director; Witness D, a supervisory monitoring specialist at the Office of the State Superintendent of Education ("OSSE"); Witness A, a DCPS monitoring specialist; Witness E, the Principal of School E; and Witness F, a specialist at School F.

IV. Issues

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

1. Did DCPS fail to implement the Student's Individualized Education Programs ("IEPs") that were in effect during the 2017-2018 and 2018-2019 school years? If so, did OSSE and DCPS violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a Free Appropriate Public Education ("FAPE")?

Petitioner contended that the Student did not receive required vision services during this time.

2. Did DCPS change the Student's educational placement in May, 2019, without providing the Student's parent a meaningful opportunity to participate in an IEP meeting? If so, did DCPS violate 34 CFR Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to recommend a school for the Student that could appropriately implement the Student's IEP for the 2019-2020 school year? If so, did DCPS violate 34 CFR Sect. 300.323(c)(2) and related provisions? If so, did DCPS deny the Student a FAPE?

Petitioner contended that the recommended schools could not provide the Student's required vision services and a "competency-based" curriculum.

As relief, Petitioner proposed that the Student should be assigned to School B for the 2019-2020 school year and compensatory education.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities (Autism Spectrum Disorder, visual impairment including blindness).

The Student has been diagnosed with Duane Syndrome, a congenital disorder of the eyes, and requires vision services to appropriately access his/her education. The services are needed to address the Student's vision fatigue, among other issues. The Student functions well below grade level in reading, mathematics, and writing due to various deficits, including in regard to processing speed, attention, self-regulation, and related issues. The Student also has deficits in speech and language, in particular in relation to determining the meaning of inferential references. The Student also has difficulty advocating for him/herself, using conversation "starters" with peers, and ignoring inappropriate comments from peers. The Student needs individualized instruction, reading material presented in "small chunks," written material supported by assistive technology, and appropriate modeling. The Student also requires access to large print. Testimony of Petitioner; Testimony of Witness C; P-7; P-18.

2. In or about July, 2014, the Student received a Functional Vision Assessment which recommended that the Student receive vision services to address the Student's vision fatigue and allow the Student to better access technology designed to help students with vision issues. Testimony of Petitioner; P-18.

3. At that time through the start of the 2017-2018 school year, the Student attended School A, a non-public school for special education students. School A contracted with a provider, Provider A, to deliver the Student's vision services. The Student's IEPs entitled him/her to four hours of vision services per month, though the Student did not receive the required vision services regularly while at School A. Testimony of Petitioner; P-4-20; P-5-18.

4. The Student began the 2017-2018 school year at School A, but both DCPS and Petitioner agreed that, although School A was initially appropriate for the Student when s/he was younger, it was no longer appropriate. The Student, who was being bullied at the school, was so upset with the environment at the school that s/he required an evaluation to address his/her emotional issues. The parties therefore searched for a new school for the Student. DCPS referred the Student to School B. DCPS was aware, at that time, that School B issued its own diplomas to students. School B conditioned its acceptance of the Student on DCPS agreeing to provide for the delivery of vision services to the Student. As a result, DCPS broke with usual practice and entered into a contract with a vision service provider (Provider B) to provide the Student with vision services at School B. The Student was admitted to School B in or about October, 2017. Testimony of Witness A; Testimony of Witness B; P-21.

5. School B is a non-public school for students with disabilities. The school originally received a Certificate of Approval from OSSE in 2009. The school provides education to students through a system that is "competency-based." In this system, a student must show "mastery of academic content" to receive credits. The school does not operate with a traditional grading system, and a student may require additional time in a given classroom to receive credit for the class. The school emphasizes its post-secondary vocation and employment program, and provides students with workshops to learn actual job skills, as well as trips to the community to try different jobs. Each student works at his or her own pace. The children at School B range from ages six to twenty-two, and school begins on the first day of July each year. The school offers an eleven-month program for students with a wide range of disabilities. Classes start at 8:20 a.m. and end

at 3:00 p.m. Classes last forty-five minutes, and there are between five and ten students in each class. Classes are taught by certified special education teachers. Each classroom also has an assistant teacher. A year of tuition at the school costs $40,224.00, with additional costs for certain services. There are approximately 131 students in the Student's section of the school. Testimony of Witness C; Testimony of Petitioner.

6. The Student benefitted from School B's "competency-based" approach. The Student was emotionally "fragile" when s/he started at School B, but quickly felt safe and "blossomed" at the school. The Student made progress in all academic areas and participated in extracurricular activities. The Student was considered a leader at this school. Vision services were not implemented for the Student at School B until approximately January-February, 2018 (except for a brief period of time in November, 2017). Testimony of Petitioner; Testimony of Witness A; Testimony of Witness B; Testimony of Witness C; P-6; P-21-7-16, 19; P-22-1-5; R-3-2.

7. A multidisciplinary team meeting ("MDT meeting") was held in connection to the Student on December 1, 2017. At the meeting, Petitioner and representatives from DCPS discussed the failure to provide the Student with vision services at School B. Additionally, the parties discussed the Student's transition to School B, which the team felt was positive. A special education teacher indicated that the Student was willing to attempt assignments, liked the school, and enjoyed individual assistance at the school. Testimony of Witness C; Testimony of Witness B; Testimony of Petitioner; P-6-1-2.

8. In or about February, 2018, as a result of the Student's missed vision services, the Student was provided with a compensatory education package consisting of

twenty-four hours of tutoring services and twenty-four hours of vision services. P-22-7; Testimony of Petitioner.

9. In or about March, 2018, OSSE found out that School B was not offering classes in District of Columbia History or foreign languages. These classes are required for schools to receive a Certificate of Approval from OSSE. OSSE asked School B, as it had in 2013, to provide classes in District of Columbia History and foreign languages. School B refused to provide its students with foreign language classes. Testimony of Witness D; Testimony of Witness C; P-22-9, 15.

10. The Student finished the 2017-2018 school year at School B. Since the Student was recommended for an eleven-month school year, the Student started the 2018-2019 school year at School B on July 1, 2018. The Student was supposed to receive vision services during the summer of 2018. However, no services were provided to the Student because Provider B's staff was unavailable. Testimony of Petitioner; P-22-14.

11. On October 11, 2018, an IEP team was convened for the Student. The team agreed that the Student was doing well at School B and did not discuss the school's issues with OSSE. The team also discussed the Student's graduation. At the meeting, Witness A mentioned that the Student would not be able to receive a DCPS diploma and would instead receive a School B diploma (if s/he graduated from the school). Testimony of Petitioner; P-8.

12. The Student's IEP of October 11, 2018, included goals in mathematics, reading, written expression, vision, communication/speech and language, emotional, social and behavioral development, and motor skills/physical development. The IEP recommended twenty-eight hours per week of specialized instruction outside general

education, with one hour per week of vision services (written in the IEP as "specialized instruction"), 180 minutes per month of occupational therapy, 240 minutes per month of speech-language pathology, and 120 minutes per month of behavioral support services. Thirty minutes of specialized instruction, or "consultation," was also recommended. The Student's IEP further recommended text-to-speech software, speech-to-text software, word prediction software, Bookshare/audiobooks, a calculator, a digital recorder, and a dedicated computer. The IEP also recommended sensory breaks, graphic organizers, guided notes, movement breaks, noise cancelling headphones, word banks, multiplication charts, math models, strong colors for highlighting, fidgets, a slant board, listening to music during independent work, checklists, and non-verbal signals for needed breaks. P-7; Testimony of Witness A.

13. At least in part because of the missed vision services during the summer of 2018, DCPS offered the Student an "updated" tutoring authorization: thirty-two hours of tutoring at a rate of $65.00 per hour, to compensate for services missed. R-7.

14. In or about March, 2019, Witness A indicated to Petitioner that the Student was going to be removed from School B because the school was about to lose its OSSE Certificate of Approval. Also in March, 2019, the Student's vision services stopped because OSSE believed the provider was overbilling for services, in particular travel expenses. Testimony of Petitioner; R-31; Testimony of Witness A; P-23-5.

15. On May 31, 2019, Petitioner met with DCPS staff in regard to the Student's school placement for the 2019-2020 school year. DCPS told Petitioner that the Student needed to be placed in another school by June 30, 2019, because School B was losing its certification. DCPS suggested placing the Student at School C or School D,

neither of which had accepted the Student. Petitioner expressed that the Student needed to go to a school that would accept the Student's credits from School B, which would allow the Student to graduate at approximately the same time as s/he was expected to graduate from School B. Witness A stated that DCPS would do its best to make sure that the Student would be matched with the correct program to keep him/her on track to graduate at the expected time. Witness A also expressed that it was "unfortunate" that the Student had to change schools. No changes were made to the Student's IEP at this meeting. Testimony of Witness A; P-9; Testimony of Petitioner.

16. In June, 2019, DCPS reached out to Petitioner to facilitate visits to non-public schools that could educate the Student in the 2019-2020 school year. Petitioner, who works as a special education teacher herself, and was formerly a "master teacher" for DCPS, was not available to view schools until late June, 2019. School B's OSSE Certificate of Approval was revoked on June 30, 2019. Testimony of Witness A; Testimony of Petitioner; P-23-14, 55.

17. By July 1, 2019, the Student had not been accepted to any school, and DCPS and OSSE resisted providing the Student with transportation to School B. As a result, Petitioner and DCPS began to discuss other schools. In late July, 2019, Petitioner visited School E, a non-public special education school for students with disabilities that had been undergoing renovation. Petitioner felt the school was dilapidated, pointing to the lack of "smart boards" and the paint coming off of some of the walls in the school. School E's staff included three social workers and "behavior specialists," and the school awarded vouchers at the school store as incentives to students with behavioral issues. The school services students from ages six to twenty-two and assigns no more than seven

students to a classroom. There are approximately fifty-two students currently in the diploma program at the school, which does not offer a "competency-based" curriculum. Students at School E have several ways to get additional credits in a given school year, such as by dropping physical education classes and/or taking "condensed courses" over the summer. The school charges approximately $260 per day as tuition. The Student was accepted at School E on July 29, 2019. Testimony of Witness E; Testimony of Petitioner; R-8.

18. In or about August, 2019, Petitioner visited School F. Petitioner was impressed by the physical plant at School F but felt the school was inappropriate because the Student would have to repeat a grade at School F and would graduate later than expected. School F is a non-public special education school that contains students with a variety of disabilities. School F does not provide "competency-based" programming to students, about fifty percent of whom are on a diploma track. Classes at the school contain no more than twelve students. The school costs approximately $75,000 per year. The Student was accepted at this school on August 21, 2019. Testimony of Witness F; Testimony of Petitioner; R-9; P-23-72, 78.

19. The Student currently attends School B, based on the stay-put order of this Hearing Officer dated August 6, 2018. The Student needs approximately seven credits to be able to graduate from School B. Testimony of Petitioner; Testimony of Witness C.

VI. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

> Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i).

Respondent argued that the burden of persuasion for Issue #1 and Issue #3 should be on Petitioner, not Respondent, because "implementation" issues do not involve the "appropriateness" of a program. However, at least to this Hearing Officer, a school that cannot substantially implement a student's valid IEP must be considered inappropriate for that student. Respondent also argued that Issue #1 and Issue #3 do not involve the Student's "placement" and are instead about the Student's school setting, which is distinct from the Student's "placement." However, courts have made clear that a student's school setting is a main part of a student's educational placement. Eley v. D.C., 47 F. Supp. 3d 1, 17 (D.D.C. 2014) ("a change in physical location may—and often will be" a change in educational placement). Therefore, the burden of persuasion must be on Respondent for Issue #1 and Issue #3, provided that Petitioner presents a *prima facie* case on these issues. Issue #2 does not directly involve the appropriateness of the Student's IEP and placement. For this issue, the burden of persuasion must be on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to implement the Student's IEPs that were in effect during the 2017-2018 and 2018-2019 school years? If so, did OSSE and DCPS violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

"Failure to implement" claims are actionable if a school district cannot materially implement an IEP. A party alleging such a claim must show more than a *de minimis* failure, and must show that material, or "substantial or significant," portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007). Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013).

There is no dispute that the Student's IEPs recommended that the Student receive one hour per week of vision services. As a result, DCPS and OSSE arranged for an outside provider, Provider B, to deliver the services at School B, but these services did not start (except for a brief period in November, 2017) until they were finally "approved" on January 11, 2018. Additionally, there is no dispute that the Student's vision services were not provided during the summer of 2018 because the provider was not available. Moreover, there is no dispute that the Student's vision services were not provided after March 15, 2019, because OSSE would not pay for them due to a dispute with Provider B.

The failure to provide any recommended services for extended periods of time generally leads to a finding of FAPE denial. Lofton v. District of Columbia, 7 F. Supp.

3d 117 (D.D.C. 2013) (student was supposed to receive thirty minutes of occupational therapy per week, but a school official testified that "the school is currently unable to provide occupational therapy"). In closing argument, DCPS suggested that the Student did fine without his/her vision services, but no witnesses at the hearing indicated that the Student's vision services were unimportant or immaterial to his/her education. To the contrary, the evidence and testimony in the record indicate that the Student's vision services were initiated because the Student has a rare syndrome called Duane Syndrome, which caused an evaluator to recommend this service in 2014.

DCPS also suggested that difficulties with implementation were a function of School B's obstinate refusal to contract with Provider B on behalf of the Student. However, DCPS did not provide any authority to suggest that "failure to implement" claims can be excused if the Local Educational Agency ("LEA") has difficulty in accessing those services. DCPS denied the Student a FAPE when it failed to provide the Student with regular vision services during the 2017-2018 and 2018-2019 school years.

2. Did DCPS change the Student's educational placement in May, 2019, without providing the Student's parent a meaningful opportunity to participate in an IEP meeting? If so, did DCPS violate 34 CFR Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

Parents must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of their child, and the provision of FAPE to their child. 34 CFR 300.501(b)-(c). A "meeting" does not include informal or unscheduled conversations on issues such as teaching methodology, lesson plans, or coordination of service provision, or preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at

a later meeting. Parents also must be a member of any group that makes decisions on the educational placement of their child. 34 CFR 300.501(b)-(c).

Petitioner contended that she was not afforded an opportunity to genuinely meet with DCPS and discuss the Student's educational issues after DCPS told her that the Student had to move schools in or about March-May, 2019. But Petitioner did meet with DCPS on May 31, 2019, to discuss these issues. At this meeting were the Student's "IEP mentor," an occupational therapist, a speech-language pathologist, a social worker, a transition specialist, Petitioner, the Student's godmother, Witness A, Petitioner's counsel, and an IEP coordinator. DCPS told Petitioner that the Student could no longer attend School B because it could not lawfully recommend that the Student attend a school without an OSSE Certificate of Approval. There is no dispute that this is correct. DCPS then indicated to Petitioner that it would find a school that would be able to implement the Student's IEP and suggested looking at two schools, School C and School D, that also provided vision services.

Petitioner disagreed with this approach, but an LEA is not obliged to agree with everything that a parent wants at an IEP meeting. All that is required is that an LEA give a parent a fair opportunity to speak and then consider what the parent says when determining the appropriateness of the program for a student. The record makes clear that Petitioner was able to voice her objections at this meeting. Indeed, together with counsel, Petitioner was able to vigorously respond to DCPS's recommendations. At the meeting, Petitioner indicated that: a new school would be the Student's third school in less than two years; the Student's emotional stability had improved since s/he attended School B; and the transition to a new school would create issues that could affect the

Student's expected graduation date. In fact, at the meeting, Petitioner indicated that she planned to file a Due Process Complaint in order to keep the Student at School B for the 2019-2020 school year. There is nothing in the record to suggest that DCPS was dismissive of these positions in any way. In fact, at the meeting, Witness A agreed that the goal was to keep the Student in a program that would allow him/her to graduate within the expected timeline. Petitioner therefore did meaningfully participate in the meeting that was held on behalf of the Student in May, 2019. This claim must be dismissed.

3. Did DCPS fail to recommend a school for the Student that could appropriately implement the Student's IEP for the 2019-2020 school year? If so, did DCPS violate 34 CFR Sect. 300.323(c)(2) and related provisions? If so, did DCPS 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, in addition to the more common "failure to implement" claims referred to in the discussion of Issue #1, *infra*, petitioners may bring claims based upon the overall appropriateness of an educational placement, even if the subject school can implement the IEP. 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 no benefit from the services that he or she is offered by the school district, the child has been denied FAPE).

Petitioner contended that Respondent cannot implement the vision services requirement in the Student's current IEP. However, Respondent has shown that it *can* implement the terms of the Student's IEP in regard to vision services, both at School E and at School F. Witnesses from both schools testified that the schools would be able contract with vision service providers who would enter the school and provide the Student with vision services throughout the 2019-2020 school year. There is nothing in the record to contradict the witnesses on these points.

However, there remains the question of whether transferring the Student to a school with a curriculum that is not "competency-based" is appropriate. DCPS argued that "competency-based" programming was not part of the Student's education placement and could therefore be eliminated from the student's program without any significant impact on the Student. However, the record suggests that the "competency-based" curriculum is at the very heart of the Student's education at School B. School B's "competency-based curriculum" is an all-encompassing approach that dominates the Student's education at School B. This curriculum emphasizes vocational education and excludes some classes that students take in more traditional schools, such as foreign language classes. Additionally, School B's curriculum allows students to take as long as they need to complete a given course. Instead of taking final exams, students are assigned a series of specific goals that they must master in order to get credit for the course. The course does not end until the students meet each goal to the satisfaction of the teacher. Clearly, the "competency-based" curriculum was a main part of the Student's educational "placement" during the 2017-2018 and 2018-2019 school years.

Moreover, the record indicates that the Student has thrived with this individualized, practical approach to education. In particular, the Student, who is conscious of his/her weaknesses, welcomes the more "discreet" program at School B, which has not resulted in any bullying problems for him/her. This has led to meaningful progress both academically and emotionally. Indeed, at the IEP meeting in October, 2018, DCPS representatives, including Witness A, agreed that the Student benefitted from the approach at School B and recommended that the Student continue at School B for the 2018-2019 school year. It is noted that the Student did not fare nearly as well at his/her previous school, School A. Petitioner, who is a certified special education teacher (and who came across credibly), emphasized that the Student had so much behavioral and emotional trouble at School A that s/he had to be evaluated by a children's hospital to assess what was wrong. DCPS agreed with Petitioner that School A was not a good fit for the Student and recommended that the Student attend School B.

Additionally, as Petitioner pointed out, the transfer to a new school would likely cause the Student to wait an extra year before s/he graduates, which DCPS itself called "unfortunate." In fact, at the meeting in May, 2019, DCPS acknowledged that Petitioner's concerns about graduation were legitimate. At the meeting, when Petitioner asked if the Student would still be on track to graduate in the expected timeframe, Witness A indicated that "OSSE will do its best to make sure to match [the Student] to the *correct* program to keep [him/her] on that route." P-9-1 (emphasis added). Holmes v. District of Columbia, 680 F. Supp. 40 (D. D.C. 1988) ("to send the plaintiff to a new school to complete the last semester of schooling would be "insensitive"); Delaware County Intermediate Unit #25 v. Martin, 831 F. Supp. 1206

(E.D. Pa. 1993) (noting the importance of allowing a student to finish out a brief school period); cf. Burger v. Murray County School Dist., 612 F. Supp. 434 (N.D. Ga. 1984) ("obvious advantages adhere to any child who is permitted to learn in a stable environment. This advantage may have even more meaning to the handicapped child"); Block v. District of Columbia, 748 F. Supp. 891 (D.D.C. 1990) ("mid-year change of placement" would pose a serious educational risk to student who was also emotionally fragile, had transferred from school to school previously, had made progress in the parentally preferred school).

Parenthetically, at the meeting on May 31, 2019, Witness A said that that the issue of the Student's school placement should have been resolved by June 30, 2019, apparently because non-public schools tend to start on July 1. However, the Student was not offered a seat at School E until July 29, 2019, and the Student was not offered a seat at School F until August 21, 2019. The delays were not attributable to the actions of Petitioner, who took the Student to as many proposed schools as possible, given that she is a teacher with a teacher's demanding schedule. This Hearing Officer agrees with Petitioner that, on these facts, DCPS denied the Student a FAPE when it required the Student to attend a new school that did not provide "competency-based" instruction for the 2019-2020 school year.

RELIEF

Petitioner seeks continued placement of the Student at School B, and an evaluation to determine the appropriate award of compensatory education for the Student.

When school districts deny students a FAPE, courts have wide discretion to ensure 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." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the court laid forth rules for determining when it is appropriate for hearing officers 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 to Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir. 1991)). The court 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.

In support of her position, Petitioner presented the testimony of Witness C, who provided information about the Student's progress at School B. As already noted in this decision, School B provides students with a highly individualized program with an emphasis on vocational instruction that allows students to learn at their own pace and focus on goals. This "competency-based" program has proven to be appropriate for the Student, who has made gains academically and emotionally since starting at the school in

2017. The school also provides students with a low teacher-to-student ratio (no more than ten students per class), classes that are taught by certified teachers, and classrooms with an assistant teacher.

It is true that School B is not currently approved by OSSE, does not provide the Student with District of Columbia History classes or foreign language classes, and awards graduates its own diploma rather than a DCPS diploma. Yet DCPS, through Witness A knew at the IEP meeting of October, 2018 that School B had no District of Columbia History classes or foreign language classes, and that it provided its own diploma to students. At that meeting, DCPS, through Witness A, nevertheless agreed that School B was appropriate for the Student. Indeed, prior to OSSE's involvement, DCPS never raised any issue with respect to District of Columbia History classes, foreign language classes, or diplomas for the Student at School B.

In its closing argument, DCPS stressed that it has recently learned that School B also does not provide students with the requisite amount of math and science classes, as measured by District of Columbia guidelines. DCPS thus suggested that School B would deprive the Student of his/her required education, also pointing out that School B cannot now be subject to oversight by DCPS or OSSE, since it is uncertified. But DCPS failed to acknowledge that many courts and hearing officers have ordered school districts to pay for tuition at unapproved non-public schools since the IDEA was enacted. Although Congress envisioned that children with disabilities would be educated in public schools, or in private schools "chosen jointly by school officials and parents," it also "provided that parents who believe that their child's public school system failed to offer a free appropriate public education—either because the child's IEP was inadequate or because

school officials never even developed one—may choose to enroll the child in a private school that serves her educational needs." Leggett v. District of Columbia., 793 F.3d 59, 63 (D.C. Cir. 2015); Florence Cnty. Sch. Dist. 4 v. Carter, 510 U.S. 7, 15 (1993).

DCPS also urged this Hearing Officer to deny tuition payment to School B because it has allegedly made untrue assertions to OSSE. While the record does provide some support for this allegation, there is nothing in the record to indicate that School B's communications with OSSE suggest anything about the school generally, or would have any impact on the Student's education going forward.

Finally, DCPS argued that School B would not be able to provide the Student with vision services going forward because both the school and OSSE refuse to contract Provider B to provide the services. However, the record suggests that Provider B remains willing to provide the services for the Student, and the record does not clearly establish or even suggest that Provider B is the only provider of vision services in the area where the school is located. Under the circumstances, DCPS is ordered to pay for the Student's tuition, including vision services, at School B for the 2019-2020 school year.

Petitioner also seeks compensatory education in regard to the vision services that were missed. 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.

DCPS's failure to provide the Student with vision services in the 2017-2018 school year and during the summer of 2018 has already been remedied by compensatory education plans offered by DCPS in February, 2018 (forty-eight hours of services: twenty-four hours of tutoring and twenty-four hours of vision services), and in September, 2018 (thirty-two hours of tutoring). These plans were accepted by Petitioner, who testified that the Student has used all of these hours. Petitioner did not testify that the plans failed to compensate the Student for the corresponding FAPE deprivation, and Petitioner did not call an expert witness to explain how either of these plans was in any way inadequate.

However, there was an additional time period when the Student did not receive vision services, running from March, 2019, through the present. No plan was ever accepted in connection to the FAPE deprivation during that period. However, Witness A testified that in July, 2019, DCPS offered Petitioner a compensatory education plan consisting of forty-five hours of compensatory tutoring, five hours of occupational therapy, five hours of speech and language therapy, five hours of mentoring, and five

hours of vision therapy. There is nothing in the record to suggest that this generous plan is inappropriate or inadequate in any way, and Petitioner did not call a witness to support her contention that the Student needs an evaluation in order to calculate a more appropriate or accurate compensatory education award in this case. Accordingly, DCPS's proposed compensatory education plan will be adopted by this Hearing Officer in this decision, and Petitioner's request for a compensatory education evaluation will be denied.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for the Student's tuition at School B for the 2019-2020 school year, including the provision of vision services as required in the Student's IEP;

2. Respondent shall provide the Student with forty-five hours of tutoring services, five hours of occupational therapy services, five hours of speech and language therapy services, five hours of mentoring services, and five hours of vision services, all to be provided by qualified and/or licensed providers of such services;

3. DCPS may select the provider for the compensatory education services, which must be used by the Student by December 30, 2020;

4. Petitioner's additional requests for relief are hereby denied.

Dated: September 28, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.

OSSE Division of Specialized Education
[redacted]/DCPS
[redacted]/DCPS

VIII. 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: September 28, 2019

Michael Lazan
Impartial Hearing Officer