

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

OSSE
Student Hearing Office
May 30, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

SCHOOL A PUBLIC CHARTER SCHOOL,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

A Due Process Complaint (“Complaint”) was received by School A PCS (“Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on January 31, 2014 in regard to the Student. This Hearing Officer was appointed to preside over this case on February 4, 2013.

On March 10, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on March 16, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issues in the case.

A subsequent Due Process Complaint was filed by Petitioner on March 28, 2014. The parties agreed to consolidate the two cases, and an order was issued in connection to the consolidation on April 13, 2014.

Two continuance orders were granted in this case without opposition. The first order extended the timelines to May 9, 2014 because of Respondent's unavailability due to testing. The second order extended the timelines to May 29, 2014.

Hearing dates followed on May 16 and May 19, 2014. This was a closed proceeding. Petitioner was represented by Roberta Gambale, Esq. Respondent was represented by Lauren Baum, Esq. Petitioner entered into evidence exhibits 1-42, 43-47, 49-52. Respondent entered into evidence exhibits 1-49. Petitioner presented as witnesses: Petitioner; Witness G, an advocate; Witness F, a psychologist; Witness H, a psychiatrist. Respondent presented: Witness A, a social worker; Witness B, a psychologist; Witness C, an assistant director of Student Support Services; Witness E, an associate director of Student Support services; Witness D, a psychiatrist.

JURISDICTION

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

ISSUES

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

1. Did Respondent deny the Student a FAPE when it failed to determine that the Student was eligible for services in its meetings dated November 8, 2012, March 25, 2013 and January 24, 2014?

2. Did Respondent fail to assess the Student in all areas of suspected disability in connection to meetings of November 8, 2012, March 25, 2013 and January 24, 2014? If so, did DCPS deny the Student a FAPE?

3. Did Respondent deny the Student a FAPE when it refused to provide the Student with an I.E.E. after Petitioner's request dated March '18, 2014?

FINDINGS OF FACT

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

1. The Student is not eligible for services. (P-1-1)
2. The Student is supposed to be attending School A, but not been attending school. (P-3)
4. The Student has been diagnosed with Depression, Intermittent Explosive Disorder, ADHD, Mood Disorder, and ODD and enuresis. She will burn and cut herself. (P-4-2; Testimony of Witness A, Petitioner; P-45-1)
5. She wakes up at 2pm, and goes to bed at 3am or 4am. (Testimony of Witness A)
6. The Student was hospitalized last school year and has been hospitalized two times this school year. (Testimony of Petitioner)

7. The Student does not want to go back to School A, but does want to go back to school. (Testimony of Witness F)
8. Issues associated with Mood Disorder NOS impact on her learning and educational performance. (P-45-1)
9. The Student has attention issues and often has a short attention span. (P-4-9)
10. The Student will get in trouble and be disobedient. (P-4-9)
11. The Student does not like to go to individual therapy. The Student requires a social skills group. (P-44-5; Testimony of Petitioner)
12. The Student picks and chooses which schoolwork to do. (Testimony of Petitioner)
13. She requires accommodations and modifications during instruction. (Testimony of Witness B)
14. The Student is on grade level in English Language Arts areas as per academic testing in 2011 and 2012. (P-2-6)
15. The Student has a relative weakness in math problem solving. The standard score for math problem solving was an 80 on the WIAT-III measure in October, 2012. This can be compared to testing conducted in July, 2009, when the Student scored a standard score of 117 in math on the Woodcock-Johnson III tests of Achievement. (P-10-6; Testimony of Witness F; P-4-5-6)
16. The Student went to School A for seventh grade. (Testimony of Petitioner)
17. The student experienced difficulty in school during the 2011-2012 school year. At the time, the Student would often annoy other people on purpose, lose her temper too easily, and defy teachers. The Student would get lonely and get teased. She would often get in

trouble. The Student would often be sad in school and be negative about “things”. The Student would act strangely, have strange ideas, and avoid other adolescents. (P-4-9)

18. At this time, the Student displayed attentional issues, including a short attention span. (P-4-9)

19. The Student was often ill during this time.

20. The Student was subject to some bullying, and then would respond aggressively in connection to the bullying. (P-44-5)

21. The student was sometimes lethargic, had little motivation, and was unable to produce her best work. (P-44-7)

22. Two teachers were interviewed through BASC-2 testing in October, 2012 about the Student’s 2011-2012 school year. According to Teacher A, the inclusion teacher at the time, the Student scored at the at-risk range in regard to hyperactivity, aggression, conduct problems, externalizing problems, depression, learning problems, school problems, behavioral symptoms index, adaptability, communication adaptive skills, and study skills. She was deemed “clinically significant” in somatization and in leadership. According to Teacher B, the literacy teacher, the student scored in the “clinically significant” range in hyperactivity, aggression, externalizing problems, depression, somatization, attention problems, atypicality, withdrawal, and behavioral symptoms index. She scored in the At Risk range in conduct problems, learning problems, school problems, adaptability, leadership, and study skills. (P-4-7-8)

23. According to Emotional Disturbance Decision Tree testing in October, 2012 reflecting the viewpoints of Teacher A, the Student scored in the high clinical range in pervasive mood and depression, and in the moderate clinical range in total score, inability to build or

maintain relationships, inappropriate behaviors and feelings, physical symptoms and fears. On the Educational Impact scale, the emotional disturbance was deemed to have mild impact. (P-4-11)

24. The Student was in a residential treatment facility from June 14, 2012 through October 18, 2012. The team at this facility recommended keeping the Student in her current classroom setting at School A. (P-2-1)

25. At the facility, the Student had good days and bad days. She was treated for morbid obesity and intermittent explosive disorder. She would get involved in verbal aggression with staff, but improved during the course of her stay. (P-4-2)

26. A psychological consult dated June 27, 2012 found that the Student's emotional profile was positive for anxiety, social difficulties, moderately high reactive anger, and sleep issues. (P-3-2)

27. The parent consented to an eligibility evaluation on August 15, 2012. (P-1-1)

28. An observation of the Student on October 23, 2012 revealed that the Student was noncompliant with instructions, falling asleep in class, did not take notes as requested, and did not show concern about the assignment. (P-4-3)

29. At the IEP meeting on November 8, 2012, the team discussed portions of Witness B's psychological report and indicated that the Student needed tutoring. The team -- including the family -- felt that the Student's behavior rating scores did not suggest that a need for special education. Still, the team discussed interventions to address the Student's behaviors, including setting boundaries, clear expectations, working with her on problem solving skills and praise, and incorporating a high ratio of positive to negative comments. (P-5-2-3; Testimony of Witness B)

30. During the 2012-2013 school year, the Student had attendance issues. In the latter part of the 2012-2013 school year, the Student refused to go to school. (Testimony of Petitioner)

31. On March 21, 2013, School A created an Individual Student Attendance Plan for the Student. The plan called upon the parent to set strategies with her child including enforcing a bedtime, and laying out clothing in the morning. (R-10-2)

32. A “Section 504” meeting was held on March 25, 2013. At this meeting, there was discussion that the Student was more willing to check-in during school, and was no longer “fighting every day.” The Student was deemed eligible for services pursuant to Section 504 of the Rehabilitation Act. The team determined that the Student needed academic instruction over intersession, needed weekly check-ins with the counselor as needed, school coordination with outside providers, access to makeup work when she misses school, an academic tracker so that she can write down assignments and have the teachers sign a sheet every day, and someone check in on her to make sure that she understands if she has arrived late or misses instruction. The document indicated that the Student’s impairment requires an attendance plan. (P-9-1-2)

33. Attendance issues and failing to turn in assignments affected the Student’s academic performance during the 2012-2013 school year.

34. The Student started the 2013-2014 school year at School A. (Testimony of Petitioner)

35. The Student attended school for 4-6 weeks and then stopped. (Testimony of Petitioner)

36. There had been some picking on the Student during the school year, because she did not comply with the dress code. (Testimony of Witness E)

37. For the 2013-2014 school year, the Student's GPA was a 2.05 for the first quarter.
(P-14)

38. On December 24, 2013, Petitioner sought re-evaluation of the Student, including a comprehensive psychological assessment, an FBA, a psychiatric assessment, and a social history assessment. (P-21-1)

39. In January, 2014, there was a meeting to review the Student's Section 504 plan and to determine IDEA eligibility. Petitioner requested that the team determine that the Student to be eligible for services under the IDEA. The team again felt that there was no need for specialized instruction and that her needs could be addressed through a Section 504 plan. At this meeting, the team discussed how to address the student's issues with going to school. They discussed provided him a home program since she did not come to school. The team discussed an online curriculum. The school indicated that it would conduct a transition plan to get the Student back into school. (P-24, 26-4; Testimony of Witness C)

40. The home tutoring did not go well. Petitioner and the Student often did not allow the tutor availability. (Testimony of Witness C)

41. An FBA was conducted of the Student for March 12, 2014. This document states that an antecedent to the Student's behavior was her transition to high school. The FBA suggested that the Student's refusal to go to school is difficult to determine because the parent's views on school refusal were different than the Student's views on the subject. The parent had indicated that the Student doesn't want to go to school because of sadness and social anxiety. The Student had indicated that she wanted to stay home because she wants to have fun. (P-33-5)

42. The FBA resulted in an incentive plan, including earning credits in reading and history through extra time, credit recovery in math and science, counseling inside school, and the ability to earn money per day. (Testimony of Witness C)

43. A psychiatric assessment dated March 13, 2014 was conducted by Witness D. This assessment is based on an interview with the mother and grandmother, a psychological assessment from 2009, educational records from School A, a treatment center discharge summary, and psychological evaluations from Witness B. It contains background information and indicates that the Student meets the criteria for ADHD. His assessment concludes that the Student's problems are due to the chaotic family dynamic. (P-35-1; Testimony of Witness D)

44. Witness D talked to the parent for 10 minutes or so. (Testimony of Witness D)

45. Witness D's assessment was issued without an interview of the Student. An assessment of the Student is a major component of such an assessment. (Testimony of Witness D)

46. More information is needed to understand the Student's school refusal at this point. (Testimony of Witness D)

47. On March 18, 2014, Petitioner sought an IEE for a psychiatric evaluation of the Student after receiving the report of Witness D. (R-31)

48. At an IEP meeting in May, 2014, tutoring was agreed to, and an FBA and psychiatric was proposed. The Student was found ineligible because, it was indicated, she did not need specialized instruction. The Section 504 plan was revised to include a token economy system. (Testimony of Witness E, C)

50. The parties agree that she meets the criteria for emotional disturbance and other health impairment. (Witness C)

51. I found all the witnesses credible in this matter.

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).

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).

1. Eligibility.

Petitioner contends that Respondent denied the Student a FAPE when it failed to determine that the Student was eligible for services in its meetings dated November 8, 2012, March 25, 2013, and January 24, 2014. Petitioner contends that the Student should be deemed eligible because of both the emotional disturbance and the other health impaired classifications.

"Emotional Disturbance" is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4] adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 CFR Sect. 300.8 (c) (4) (i); 5-E DCMR Sect. 3001.1.

"Other health impairment" is an appropriate classification if a Student has limited strength, vitality or alertness with respect to the educational environment which adversely affects a child's educational performance. This classification requires identification of chronic or acute health problems such as: Asthma;, Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder; Diabetes; Epilepsy; a heart condition; Hemophilia; Lead poisoning; Leukemia; Nephritis; Rheumatic fever; or Sickle cell anemia. 34 C.F.R. Sect. 300.8(c)(9); 5-E DCMR Sect. 3001.1

The parties agree that the Student meets the criteria for both the above classifications. The question before this IHO is whether the Student's emotional disturbance and/or other health impairment has an adverse impact on the Student's educational performance, thereby necessitating specialized instruction.

Much of the evidence and testimony here indicate that the Student's emotional issues were in fact adversely impacting the Student's academic performance back as far at the 2011-2012 school year. As pointed out by Witness F, the Student's BASC-2 testing by Respondent's own teachers make it apparent that this Student was experiencing difficulty in class as a result of her emotional and attentional issues. Two teachers were interviewed through BASC-2 testing in October, 2012 about the Student's 2011-2012 school year. According to Teacher A, the inclusion teacher at the time, the Student scored at the at-risk range in regard to hyperactivity, aggression, conduct problems, externalizing problems, depression, learning problems, school problems, behavioral symptoms index, adaptability, communication adaptive skills, and study skills. She was deemed "clinically significant" in somatization. According to Teacher B, the literacy teacher, the student scored in the "clinically significant" range in hyperactivity, aggression, externalizing problems, depression, somatization, attention problems, atypicality, withdrawal, and behavioral symptoms index. She scored in the At Risk range in conduct problems, learning problems, school problems, adaptability, leadership, and study skills.

The observation of the Student in October, 2012 was consistent with that testing. During the observation, the Student was noncompliant with instructions, she was falling asleep in class, she did not take notes as requested, and she did not show concern about the assignment.

Moreover, the Student began to display manifestations of sundry physical illnesses at school during the time, suggesting to this IHO that her emotional issues were worsening.

At the eligibility meeting, the team did not credit either the observation or the BASC-2 testing, indicating that the Student's current teachers indicated that the Student was doing better in school. At the hearing, it was explained to this IHO that a change in medication and the

positive experience at a treatment facility had reduced the Students behavioral issues so that they would not adversely impact the Student.

The record does not support these assertions. There is nothing in the record to indicate that a change in medication has resulted in any major change to the Student, and there is nothing in the record to suggest that the Student's stay at the residential treatment center solved her emotional issues. Further, the Student's eighth grade teachers were not called as witnesses to explain how it was that the Student's emotional issues had then subsided. To this IHO, the preponderance of the evidence suggests that it would have been appropriate to classify the Student as eligible for services as a Student with multiple disabilities at the time of the November, 2012 meeting.

Respondent contends that the Petitioner agreed with the determination of the team that no special education services were needed at that point. While I can understand Respondent's position, Respondent presents no authority to support the notion that a parent's assent to an inappropriate determination inoculates an LEA from liability. See Letter to Lipsitt, 52 IDELR 47 (OSEP Letter December 11, 2008).

Respondent also suggests that a Section 504 plan is sufficient for this Student. Again, I can understand Respondent's position. Still, eligibility pursuant to the IDEA cannot be avoided because a Student is also eligible for services through Section 504. Yankton Sch. Dist. V. Schramm, 93 F.3d 1369, 1376 (8th Cir. 1996)("the school district is not free to choose what statute it prefers").

I should note that Witness E has written that the Student's Mood Disorder NOS had an impact on the Student's learning and educational performance. (P-45-1) Further, the interventions in the Section 504 plan are related to the Student's emotional issues. The plan

requires interventions such as weekly check-ins with the counselor as needed, access to makeup work when she misses school, an academic tracker so that she can write down assignments and have the teachers sign a sheet every day, and someone check in on her to make sure that she understands if she has arrived late or misses instruction. The Section 504 plan also indicates that the Student's impairment requires an attendance plan. Respondent suggests that such interventions are not "specialized instruction," but this term does not refer to direct instruction by a special education teacher. It merely means adapting the content, methodology, or delivery of instruction. 34 CFR Sect. 300.39(b)(3); Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1 (1st Cir. 2007)(student with typically good grades and communication issues deemed eligible); Marshall Joint Sch. Dist. No. 2 v. C.D., 592 F. Supp.2d 1059 (D. Wisc. 2009) (modifications deemed specially designed instruction); Bd. Of Educ. of Montgomery Cty. v. S.G., 45 IDELR 93 (D. Md. 2006)(general education student with passing grades and recent psychiatric events hospitalizations deemed eligible: court noted that specialized instruction does not have to relate to the content or direct delivery method of the instruction); Seattle Sch. Dist., No. 1. v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996) (citing legislative history from the Education of the Handicapped Act, the IDEA's predecessor, which recognized that although special education must address a child's unique educational needs, such needs must be "broadly construed to include [the] handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." (quoting H.R.Rep. No. 98-410, at 19 (1983))).

In sum, I agree with Petitioner that the results of the BASC-2 testing, the comments of Teacher A and Teacher B, and the observation indicate that the Student is being adversely affected by her emotional disturbance and her other health impairment. The Student is not paying attention in class and not cooperating with the teachers. A change in the delivery of

instruction to the Student was appropriate for the Student in November, 2012. Respondent denied the Student a FAPE by its eligibility determination on November 8, 2012.¹

2. Assessments.

Petitioner contends that Respondent fail to assess the Student in all areas of suspected disability in connection to meetings of November 8, 2012, March 25, 2013, and January 24, 2014.

Courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) . The FBA should focus on the antecedents to the behaviors, on the theory that a change in the antecedents can lead to a change in the behaviors. C.F. ex rel. R.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *9 (S.D.N.Y. 2011); R.K. ex rel. R.K. v. New York City Dep't of Educ., 2011 WL 1131492 at *19 (S.D.N.Y. 2011). The information gleaned from the assessment is central to formulating an IEP tailored to the needs of individual disabled children. Harris, 561 F.Supp. 2d_at 68.

In addition to an FBA, if the behavior of a student impedes the student's learning, the IEP team shall consider the use of positive behavioral supports and other strategies to address that

¹ Petitioner also contends that Respondent's March 25, 2013 and January 24, 2014 meetings improperly denied the Student eligibility. However, the record does not clearly establish that these meetings were for the purpose of determining the Student's eligibility. Rather, these meetings appear to have been conducted in connection to the Student's Section 504 plan. Accordingly, I decline to find any liability in connection to these contentions.

behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). According to DCMR Sect. 5-3007.3, an individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

An FBA is an “assessment.” As such, the failure to write up an FBA should be deemed a procedural violation. A failure to assess is a procedural violation of IDEA. Only where when the parents are able to show that harm resulted from the failure to assess, FAPE denial can result. As stated by the D.C. Circuit: “(a)n IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.” Lesesne ex rel. B.F. v. D.C., 447 F.3d 828, 834 (D.C. Cir. 2006)(emphasis in original); see also Kruvant v. District of Columbia, 99 Fed. App'x. 232, 233 (D.C. Cir. 2004) (though DCPS admitted that it failed to satisfy its responsibility to assess the student within 120 days, of her parents' request, parents did not show harm).

As noted above, the record indicates that the Student was experiencing difficulties in regard to behavior by the time of the November, 2012 eligibility meeting. To this IHO, it would have been appropriate for the eligibility team to have then determined the root of the behavior so that it could be addressed. Certainly this was clear by the end of the 2012-2013 school year, when the Student was not attending school at all. It is noted that Respondent has an “affirmative duty” to address a Student’s truancy. Springfield School Committee v. Doe, 623 F.Supp.2d 150 (D. Mass 2009)(“behavior management services” fall within the scope of IDEA); cf. R.B. v. Mastery Charter School, 762 F. Supp.2d 745 (E.D. Pa 2010)(District had duty to respond to absences through educational intervention).

However, no FBA was written to address the Student's behavioral concerns until a few months ago. No BIP has ever been written for this Student. I agree with Petitioner that it denied the Student a FAPE when it failed to conduct an FBA of the Student in connection to the November 8, 2012 review and then failed to conduct an FBA thereafter until March, 2014.

3. I.E.E.

An evaluation means procedures used in accordance with 34 CFR Sects. 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.² A reevaluation means an evaluation conducted after the initial evaluation.³

In conducting the evaluation, the LEA must use a variety of tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, to determine whether the child is eligible and, if so, the content of the child's IEP.⁴

An independent educational evaluation ("IEE") is a procedural safeguard available under the IDEA that provides the parents with the opportunity to obtain their own private evaluation of their child.⁵ When the parent disagrees with an evaluation obtained by the LEA, the parent has the right to an IEE at public expense.⁶

² 34 C.F.R. Sect. 300.15. In the District of Columbia, an evaluation is defined to include the process of reviewing at a meeting of the IEP team information from parents; existing data; and results of assessment procedures used to determine the child's present level of performance, educational needs and whether a child has a disability, and the nature and extent of the special education and related services that the child needs. DCMR. 5-E Sect. 3001.1.

³ DCMR 5-E Sect. 3001.1.

⁴ 34 C.F.R. Sect. 300.304(b)(1). In the District of Columbia, the IEP team is tasked with implementing the IDEA procedures for determining eligibility when conducting an evaluation even though the procedures under the IDEA are intended for use when interpreting evaluation data. DCMR 5-E Sect. 3005.3.

⁵ See 34 C.F.R. Sect. 300.502.

⁶ 34 C.F.R. Sect. 300.502(b)(1).

Because the parent has a right to an IEE at public expense, upon request⁷, the LEA must, without unnecessary delay, either: file a due process complaint to request a hearing to show that its evaluation is appropriate;⁸ or ensure that an IEE is provided at public expense⁹, unless the LEA demonstrates in a hearing that the evaluation obtained by the parent did not meet the LEA's criteria.¹⁰

Petitioner here contends that Witness D's assessment of the Student was insufficient. Petitioner points out that the Student was not interviewed, the parent was interviewed only briefly, that outside service providers were not contacted, and that there was not an assessment of the Student's hospital stays.

Witness D admitted that the assessment was not complete because there was insufficient exploration of the Student's school refusal issues in the report. Witness D also did not deny that the report could have been more effective were Petitioner and the Student meaningfully interviewed. While the record does indicate that the Student is difficult to gain access to, the record does not suggest that Petitioner was unwilling to be interviewed. Without these complete interviews, I find Witness D's conclusion – that the Student's issues are entirely a product of her homelife – to be speculative. I agree with Petitioner that an I.E.E. is warranted to get to the root of the school refusal and to allow for interviews of the Student and Petitioner. It is noted that an LEA is not permitted to expand its evaluation after a parental request for an IEE. M.Z. by D.Z. v. Bethlehem Area Sch. Dist., 111 LRP 47437 (M.D. Pa. 2011).

4. Remedy.

⁷ If a parent requests an IEE, the LEA may ask the parent's reason why s/he objects to the LEA evaluation. However, the LEA may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to request a hearing to defend the LEA's evaluation. 34 C.F.R. Sect. 300.502(b)(4).

⁸ 34 C.F.R. Sect. 300.502(b)(2)(i).

⁹ The LEA may not impose conditions or timelines related to obtaining an IEE at public expense. 34 C.F.R. Sect. 300.502(e)(2).

¹⁰ 34 C.F.R. Sect. 300.502(b)(2)(ii).

Petitioner asserts that appropriate relief in this matter is to order an IEP, to order special education instruction in the therapeutic setting, a BIP, an FBA, and compensatory education consisting of tutoring, art therapy, and 6 hours of credit recovery services.

I have ruled that the Student should be determined to be eligible. An IEP is therefore a necessity. An FBA has already been conducted for the Student, and should be used in connection to developing an IEP and a behavioral plan for this Student. The IEE should be also used to develop and IEP and a behavioral plan for the Student. The focus of the plan must be on getting the Student to attend school. Since such IEE is forthcoming, it is premature for this IHO to order a specific sort of educational program for the Student at this time, such as the therapeutic setting suggested by Petitioner.

In regard to the request for compensatory education, the compensatory education plan calls for 5 hours per week of academic tutoring, credit recovery programs to allow the Student to make up 6 Carnegie units, and one year of art therapy.

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 regard to compensatory education, one of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services. . . to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive" inquiry used to craft an award 'tailored to the unique needs of the disabled student").

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

Petitioner's witness, Witness H, tried to formulate a plan of academic tutoring that was connected to the standards enunciated in Reid. (P-49) While the terms of the plan appear to be thought out, I find the plan may be unrealistic and unreasonable given that the Student is resistant to 1:1 interactions. I will therefore order that the Student receive 1:1 academic tutoring for a less intense duration, i.e., for 10 hours per week. This tutoring shall last through to the

end of the summer of 2014. Should the Student or Petitioner bar the tutor access or if the Student fails to regularly attend the tutoring, the LEA may terminate the tutoring program.

I will also order that the Student receive a credit recovery program to allow the Student to make up for 6 Carnegie units.

Finally, there was no contention in this case that this Student needs art therapy. I will therefore decline to order that the Student receive art therapy as a form of compensatory relief.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by failing to determine the Student to be eligible for services on November 8, 2012;
2. The Student is eligible for services as a student with multiple disabilities;
3. Petitioner is hereby awarded an IEE to allow a private provider to conduct a psychiatric assessment of the Student;
4. Respondent will reconvene an IEP team and determine the Student's program for 2014-2015 after all members of the team are provided the IEE;
5. Respondent shall provide the Student with a credit recovery program to allow the Student to gain 6 Carnegie units;
6. Respondent shall provide the Student with 2 hours per week of academic tutoring by a certified special education teacher through to the end of the summer of 2014;
7. If the Student or Petitioner deny the tutor access to their domicile, or if the Student misses more than three sessions without a medical note or compelling family or medical excuse, the LEA may terminate the tutoring.

Dated: May 29, 2014

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Date: May 29, 2014

Michael Lazan
Impartial Hearing Officer