

**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
June 24, 2013

Date Issued: June 21, 2013

Student,¹

Petitioner,

v.

District of Columbia Public Schools,

Hearing Officer: Michael Lazan

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") received by Respondent on May 15, 2013. This IHO was appointed to hear this matter on May 20, 2013. Respondent filed a Response to the Complaint on May 22, 2013.

The Petitioner will be referred to as Petitioner or the Student in the course of this HOD. The Respondent will be referred to as Respondent or DCPS in the course of this HOD.

The HOD was due on June 21, 2013, 10 school days after the date of the last hearing.

A Prehearing Conference was held on May 28, 2013. Appearing were Roberta Gambale, Esq., counsel for Petitioner, and Lynette Collins, Esq., counsel for Respondent. A Prehearing

¹ Personal identification information is provided in Appendix A.

Conference Summary and Order was issued on May 30, 2013 and then in reissued with revisions on May 31, 2013.

Hearing dates were held on June 3, 2013 and June 7, 2013. This was a closed proceeding. Petitioner was represented by Roberta Gambale, Esq. Respondent was represented by Lynette Collins, Esq. Petitioner entered into evidence exhibits 1-19; Respondent entered into evidence exhibits 1-11. Petitioner presented as witnesses: Petitioner (the Student); the parent;

Dr. (expert in clinical and school psychology and educational programming for students with disabilities); School B.

Respondent presented as witnesses: social worker; social worker; Truancy Social Worker; Counselor; teacher; teacher; teacher; School

Psychologist (expert in school psychology). At the end of the final hearing day, the parties presented oral arguments.

JURISDICTION

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

BACKGROUND

The Student is male, years old, and eligible for services as a student with other health impairment. The Complaint involves claims implicating 34 CFR 300.507(a) and 34 CFR Sect. 300.532. The Complaint indicates that DCPS failed to provide the Student with an appropriate

IEP on February 11, 2013 and March 27, 2013; that the March 27, 2013 IEP contained an inappropriate transition plan and goals; that DCPS failed to convene an MDR meeting after the Student was suspended for not less than 20 days without making any provisions for the Petitioner to receive a FAPE and without developing a BIP; that DCPS failed to develop a BIP for the Student; that DCPS failed to implement the Student's IEP of February, 2012, which provided for 90 minutes of specialized instruction, transition services, one hour a week of behavioral support services.

ISSUES

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

1. At the IEP meetings of February 11, 2013 and March 27, 2013, did DCPS improperly reject the November 2012 psychological assessment of Dr. _____ which indicated that Petitioner needed a full time out of general education setting, visual aids, activity based lessons, outlines, lists of concepts, vocabulary lists or assistive technology and related accommodations, behavioral interventions, a BIP, additional special education support, vocational training, and appropriate transition goals/plan? Do the IEPs accordingly fail to include language requiring full time out of general education setting, visual aids, activity based lessons, outlines, lists of concepts, vocabulary lists or assistive technology and related accommodations, behavioral interventions, a BIP, additional special education support, vocational training, and transition goals/plan? If so, did DCPS deny Petitioner a FAPE from February 11, 2013 to present?

2. Did Respondent fail to conduct a manifestation review of the Student after at least 20 days of in-school suspensions? If so, did Respondent fail to provide the Student with

instruction during the suspension and fail to create a BIP? If so, did Respondent deny Petitioner a FAPE?

3. Did Respondent fail to implement the services contained in the February 12, 2012 IEP, in particular 90 minutes a day of specialized instruction outside general education, transition services, 1 hour a week of behavioral supports, inclusion services inside the classroom? If so, was Petitioner denied a FAPE?

4. Did Respondent fail to conduct a speech and language assessment of Petitioner after March, 2012? If so, did Respondent deny Petitioner a FAPE when it failed to conduct such speech and language assessment?

The fourth claim was withdrawn during closing argument and will not be considered in this HOD.

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 an year old who is eligible for services as a Student with Other Health Impairment. (P-1-1)

2. The Student has oral language issues. He scored in the very low range on listening to directions. (Testimony of

3. The Student has difficulty with reading. The Student has particular difficulty with reading comprehension. The Student requires graphic organizers in reading, "think aloud" opportunities, simplification of oral directions. (P-1-3)

4. The Student has difficulty in math. Algebra is a hard subject for him. The Student needs extended time, calculators, repetition of directions, modified assignments in math.

Math work over the 6.5 grade level equivalent may be difficult for the Student to complete. Math work that is time limited may be difficult to complete. The Student needs to improve his math fluency, needs to work on numeric and algebraic calculations. (P-1-2)

5. The Student has difficulty with writing. (P-1-4)

6. In terms of social and emotional issues, the Student has been diagnosed with ADHD and Mood Disorder NOS. (Testimony of

7. The Student does well in school when he attends. He makes every effort to do the work. (Testimony of Testimony of

8. The Student does not like counseling and has not benefitted from counseling. (Testimony of Student, Testimony of parent; P-1-5)

9. When the Student got to high school he began to lose interest in school. (P-5-28)

10. The Student does not want to go to a private school. (Testimony of

11. The Student has no direction on where he is going and what he wants to be in the future. (P-5-2)

12. The Student needs a vocational plan because he does not have a career path. (Testimony of

13. The Student needs a truancy plan to address absences. The plan needs a baseline of all absences and reinforcers put in place to allow him to meet his goals. (Testimony of

14. The Student needs to engage in career exploration to determine what to pursue because he does not know what he is working towards. (Testimony of

15. The Student's academic levels need to rise for him to have more career choices. (Testimony of

16. The Student needs “drill and skill” and functional academics. (Testimony of
17. The Student has had limited experience in employment. (P-5-12)
18. The Student wants to graduate from school and have a job by the time he finishes high school. (P-5-13, 34)
19. The Student has not attended credit recovery classes. (Testimony of Student)
20. The Student wants to work, wants to be able to support himself, get a job. (Testimony of Student)
21. The Student has expressed interest in a G.E.D. or vocational training program. (P-5-7)
22. The Student has shown interest in the career areas of manufacturing, fabrication, and assembly. (P-5-8)
23. The Student wants to find a job where he can work with his hands. (R-5-3)
24. The Student is currently unable to complete a job application. (P-5-9)
25. The Student needs work in appropriate work habits and occupational choices. (P-5-9)
26. The Student was adopted by his aunt after his mother left him and his brothers by themselves. (P-4-2)
27. The Student has a difficult home life. Some of his siblings live with his birth mother, and he fights regularly with a brother who lives with him. (P-4-2)
28. The Student was diagnosed with ADHD when he was 4 or 5 years of age. (P-4-3)
29. The Student has had attendance issues at School A going back to 2010. (P-3-4)

30. Absenteeism is the Student's main problem in terms of school. (Testimony of
31. Gates-MacGinitie Reading Testing on January 4, 2010 indicated that the Student was at the 9.9 grade level equivalency. (P-3-3)
32. For the 2011-2012 school year, the Student attended School A. (Testimony of Student)
33. The Student's IEP for February 21, 2012 recommended that the Student receive 90 minutes a day of specialized instruction in a resource room outside general education. (P-3-7)
34. The Student had poor attendance at School A during 2011-2012. (P-4-4)
35. The Student took Algebra during 2011-2012. There were two teachers in this class. However, the Student, but did not get much help in this class. (Testimony of Student)
36. In Spanish, there was one teacher. The Student understood the materials but was not interested in it because he had already taken the class. (Testimony of Student)
37. In Homeroom, the Student would get a reading worksheet with one general education teacher leading the class. (Student)
38. The Student was in a Financial Planning class, where he did not understand the material. (Student)
39. The Student was in a "Shoe and Leather" class, but did not like the class. (Student)
40. The Student took a United States Government class, which he liked. The teacher made the work easier to understand. (Student)
41. The Student failed English in 2011-2012. (Testimony of

42. The Student was retained in the 2011-2012 school year, which was eleventh grade. (P-2-6)

43. The Student did not pass last year at least in part because he could not complete a five paragraph essay. (Testimony of

44. For 2012-2013, the Student attended School A. (Testimony of Student)

45. The Student received “inclusion” classes in English, in a 90 minutes long class. (Testimony of

46. The Student received “inclusion” classes in Chemistry, which was co-taught with Ms. (Testimony of

47. The Student also received classes in Biology, Shoe and Leather, Algebra, Physical Education, United States Government, District of Columbia History. (Testimony of

48. The Student was offered credit recovery classes for the 2011-2012 and 2012-2013 school years, but he did not want to stay after school to attend the classes. (Testimony of

49. At an October, 2012 meeting, school staff told the parent that the Student was not getting his resource room services. (Testimony of parent)

50. A Student Attendance Support Plan for devised in October, 2012. This plan indicates that the school should encourage attendance and provide supports as needed. (R-3-3)

51. The Student was made available for comprehensive testing by a psychologist, in November, 2012. (P-4-1)

52. On November 11, 2012, on the Woodcock-Johnson III Tests of Achievement, the Student scored a 96 standard score in writing, equivalent to a grade level equivalent of 9.6. The

Student scored low on the subtest which asked him to write a sentence based on a prompt. (P-1-4)

53. On November 11, 2012, on the Woodcock-Johnson III Test of Achievement, the Student scored an 81, low average, which is a 6.5 grade level equivalent. (P-1-2)

54. On November 11, 2012, on the Woodcock-Johnson III Tests of Achievement, the Student received a standard score of 87 in broad reading, which is low average, 7.8 grade level equivalent. He scored a standard score of 77, 4.3 grade level equivalent, on the passage comprehension subtest, which is a “cause for concern.” (P-1-3; P-4-7-8)

55. The Student’s general intellectual ability, as measured on the Woodcock Johnson III BIA in November, 2012, was an 86, low average range. (P-4-7)

56. On the same test, the Student’s verbal ability and cognitive ability were tested in the average range. (P-4-7)

57. On BASC-2 testing conducted in November 2012, as completed by parent, the Student was at risk for hyperactivity, conduct problems. He was in the clinically significant range for the Behavioral Symptoms Index., with clinically significant scores in withdrawal, attention problems, atypicality. He was in the clinically significant range in the Adaptive Skills composite, with clinically significant scores in adaptability, social skills, leadership, functional communication. (P-4-10)

58. In November 2012, the Student was assessed by Dr. [redacted] to have Mood Disorder NOS, ADHD-Combined Type, Cognitive Disorder NOS. (P-4-14)

59. Dr. [redacted] recommended that the Student be provided a small, self-contained class for students with emotional disturbance and ADHD and that he should receive individualized attention. She recommended that he be placed in a “therapeutic school” that

offers a trade as part of its curriculum. She recommended that he receive counseling support, a truancy and absenteeism behavioral plan (complete with a baseline of attendance, goals to improve attendance and punctuality, rewards paired with achieved goals), a vocational evaluation to determine a possible career path). She also recommended family therapy. She also recommended activity based lessons, concrete visual aids, outlines, lists of key concepts, vocabulary lists prior to lesson presentations. She also recommended reading interventions consisting of modified test delivery offering extended time, teaching the Student to study pictures, graphs and headings, teaching him to read the first and last paragraph in a chapter or the first sentence in each section, teaching the Student to highlight, summarize, and review important ideas and text. To improve the Student's written skills, the recommendations are for extra time, a word processor, appropriate computer software. To improve the Student's math skills, the recommendations are for extra time, additional drill and skill practice, and learning how to use a calculator. (P-4-16)

60. A Transition Assessment Report was prepared by _____ Inc. on February 13, 2013. This report recommends outcome-based transition goals and objectives in the areas of increasing self-determination skills, postsecondary education, employment, life skills, social skills, community participation. It recommends job shadowing, internships, vocational training supported employment at school and in the community. The report also recommends an increase of his functional math and reading levels, an FBA to determine attendance, truancy support services such as intensive attendance monitoring, mentoring, after school activities, tutoring, home visits. (P-5-3)

61. The report indicates that recommended career areas for this Student (according to testing) are teacher aide, distribution/warehouse, postal worker, taxi driver, truck driver. (P-5-19)

62. An IEP meeting was held on February 11, 2013. The IEP provides for 90 minutes per day of specialized instruction outside the general education setting, with 120 minutes per month of behavioral support services outside the general education setting. (P-2-7)

63. The IEP indicates that the Student is in need of encouragement to go to school. There is a goal in the IEP for the Student to attend school on a consistent basis and demonstrate an awareness of the impact that excessive absences have on his academic progress with 80 percent accuracy. (P-2-5)

64. The Student's other emotional, social and behavioral development goals relate to truancy, improving self-esteem, improving interpersonal skills, increasing on task and compliant behaviors. (P-2-5-6)

65. In writing, the Student is recommended to receive modifications of the assignment, extended time, graphic organizers. In reading, the Student is recommended to receive graphic organizers, simplification of oral directions, having him think aloud. In math, the Student is recommended to receive extended time, modified assignments. The IEP recommends simplification of directions, repetition of directions, calculators, preferential seating, extended time on subtests, tests administered over a few days. (P-2-4, 9)

66. The IEP of March 27, 2013 recommends 90 minutes per day of specialized instruction in a general education setting, with behavioral support services of 240 minutes per month outside of the general education setting. (P-1-7)

67. The IEP meeting dated March 27, 2013 was to go over the transition plan, services.

68. This IEP contains the same language relating to attendance and truancy as the February 11, 2013 IEP. (P-1-5-6; P-2-5-6)

69. from Inc., appeared at the meeting but did not speak much at the meeting. (Testimony of parent)

70. At the meeting, the team was not open to suggestions regarding the transition plan. (

71. The Student's Post-Secondary Transition Plan references a Functional Skills Assessment. This assessment indicates that the Student is able to derive information from train schedules, can travel independently, prepare meals for himself, make an appointment with a doctor. (P-1-11)

72. Transition services for the Student include 1 hour a year to work on completing a job application, one hour a year of working on interview/internet skills for the Student, two hours per year of providing personal finance skills for the Student . (P-1-13-14)

73. Transition goals include practicing personal finance skills, exploring careers with his hands, applying to 2 trade schools. (P-1-12-14)

74. The Student's attendance problem caused him to fail to turn in his final project in English, which he failed during 2012-2013. (P-1-3)

75. The Student attended classes about three times a week during 2012-2013. (P-4-3)

76. Counseling services were provided for 30 minutes monthly in the 2012-2013 school year through January, 2013. (Testimony of

77. In January, 2013, School A was told that the Student he should get 1 hour per week of counseling per the order. The Student then received 1 hour per week of counseling services. In February, 2013, School A reduced his services back to 30 minutes because the student did not show up. In March 2013, School A increased his services to one hour a week. (Testimony of

78. The Counselor saw him November, 2012 to January, 2013 about 2-4 times.

(Testimony of

79. School A has not been providing the student with much assistance on vocational/transition services. (Testimony of parent; Testimony of Student)

80. The Student has been subject to one period of in-school suspension for being late in the mornings. When he is suspended, he is given makeup work to do late and hand in.

(Testimony Student; Testimony of

81. There was no special education teacher to replace Ms. after she left the Student's class during the second semester of the 2012-2013 year. (Testimony of

82. The Student was absent from school 32 days for the 2012-2013 school year as of March 27, 2013. (P-1-2)

83. The Student was assigned a Truancy Social Worker, but the social worker was not allowed to make changes to the students program that could encourage him to go to school.

(Testimony of

84. The Truancy Social Worker usually works to eliminate barriers to the Student's attendance such as transportation or health related barriers. (Testimony of

85. For Term 1, 2012-2013, the Student received grades of F in Algebra II/Trigonometry and Spanish 1, a C in English III. For Term 2, the Student received grades of F in Algebra II/Trigonometry, Spanish, English, Financial Planning and Environmental Science. For Term 3, the Student received grades of C- in Chemistry, C in US Government. (P-7-1)

86. In Algebra II for 2012-2013, the Student had excellent initiative. (P-7-1)

87. In United States Government for 2012-2013, the Student was a pleasure to have in the class. (P-8-1)

88. School B is a vocational high school for Students with Learning Disabilities, Students with Other Health Impairment, Emotional Disturbance. (Testimony of
89. There is a 10-1 teacher to Student ratio at the school. (Testimony of
90. The school provides classes in barbering, automotive work, cosmetology, academics, construction. (Testimony of
91. Academics are provided in the morning, and vocational classes are provided in the afternoon. (Testimony of
92. Students usually pick one vocational area to focus on. (Testimony of
93. There is a transition class to develop job placement, for instance how to fill out a checkbook, how to get an apartment. (Testimony of
94. There is a stipend that Students get to attend school. They get \$140 per month if they attend 20 days. The school costs \$216 per day. (Testimony of
95. There are 26 students total at the school. (Testimony of
96. There are 5 special education teachers at the school. (Testimony of
97. The age range of the students at the school could be ages 14-22. (Testimony of
98. The academic levels in the class vary, but the school tries to avoid having a disparity of more than two grade levels in the class. (Testimony of
99. I found all the witnesses in this proceeding credible except Ms. who I found partly credible. Ms. answers were often incomplete and/or lacking in meaningful detail.

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; Schaffer v. Weast, 546 U.S. 49 (2005). However, in cases involving a

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Schaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes “no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children.” Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 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. FAPE Denial, 2013 IEPs; Failure to Incorporate Expert Recommendations in the IEPs.

Petitioner contends that DCPS improperly rejected the November 2012 psychological assessment of Dr. [redacted] which indicated that Petitioner needed a full time out of general education setting, visual aids, activity based lessons, outlines, lists of concepts, vocabulary lists or assistive technology and related accommodations, behavioral interventions, a BIP, additional special education support, vocational training, and appropriate transition goals/plan.²

The testimony of the Student's teachers is that the Student does well in school when he attends. Mr. [redacted] indicates that the Student makes intelligent remarks in English, and is one of the brightest kids in the class. Mr. [redacted] indicated that the Student is well behaved and has the ability to do the work in Science. The testimony establishes that the Student's main problem is attendance, not the lack of accommodations in the classroom. In fact, the IEPs do provide a wide range of classroom accommodations, including repetition of directions modified instruction, use of graphic organizers, having him "think aloud." Aside from Dr. [redacted] report, there is nothing in the record to clearly indicate that the accommodations suggested by Dr. [redacted] would have a material impact on the Student in the classroom. There is nothing in the record to clearly indicate that the Student is distractible in the classroom, there is nothing in the record to clearly indicate that the Student has significant behavioral problems in the classroom. Moreover, aside from Dr. [redacted] report, there is nothing in the record to suggest that the Student requires a "therapeutic" setting. Dr. [redacted] does not define what a therapeutic setting might consist of in her report. Additionally, the record establishes that the Student does not like counseling and has not benefitted from counseling in the past.

² The prehearing order references Dr. [redacted] report in connection to transition services/plans. However, the Due Process Complaint makes broader allegations regarding transition services/plans. (see Complaint, at 9, 11-12)

However, the record does establish that the Student has significant attendance issues that are impacting him in the classroom. Indeed, the IEP itself specifically states that the Student has attendance issues and lists a goal in this connection. However, the IEP did not provide a plan to address the Student's attendance issues. While DCPS did assign a Truancy Social Worker to the Student, this social worker was unable to provide any help to the Student and could not provide the Student with any incentives to go to class. While a Student Attendance Support Plan was devised for the Student in October, 2012, this plan did not provide any specific interventions to encourage the Student's attendance beyond that "the school should encourage attendance" and "provide supports as needed."

In such a circumstance, 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 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.

No Functional Behavioral Assessment or truancy assessment has been conducted of the Student. No Behavioral Intervention Plan has been written in regard to this Student. The IEP team did not consider what specific incentives might result in the Student's improved attendance. In particular, the IEP team did not meaningfully consider whether any programmatic changes could have been made to the Student's IEP to encourage the Student to attend. As a result, the Student has not attended school regularly and has failed many of his classes for 2012-2013.

The Student also contends that DCPS failed to provide an appropriate transition plan in its IEPs. In regard to transition, these 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 C.F.R. 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 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 C.F.R. Sect. 300.320(b); see 20 U.S.C. Sect. 1414(d)(1)(A)(i)(VII).

As recently stated by a federal court:

Congress in the IDEA placed "added emphasis on transition services so that special education students leave the system ready to be full productive citizens, whether they choose to go on to college or a job." 150 Cong. Rec. S11653-01, S11656 (Nov. 19, 2004) (Conf. Rep. accompanying H.R. 1350) (Statement of Sen. Dodd). Among its many changes, the IDEA is supposed to "enhance[] planning and transition services for children with disabilities," id. at S11655 (statement of Sen. Reed), and "significantly improve[] transition services to ensure that students with disabilities are prepared for postsecondary education or employment." Id. at S11659 (statement of Sen. Bingaman).

Carrie I. v. Department of Educ., 869 F. Supp.2d 1225 (D. Haw. 2012)(while noting that a violation of transition services rules is a procedural violation, where a transition services plan that was "essentially nonexistent," FAPE denial resulted)

I agree with the Student that Respondent's transition services do not prepare the Student for post-secondary education or employment. The transition services and plan in the March IEP are general and do not provide a reasonably calculated framework for the Student to advance in the future. Services in the plan are minimal. As pointed out by Ms. 1 hour per year is not enough time for "transition services for employment." Also as pointed out by Ms. 2 hours per year is not enough time to devote to independent living services. The IEPs do not recommend job shadowing, internships, or supported employment at school and in the

community. The transition plan does mention that the Student will gain employment in a field that involves using his hands. However, the plan does not explain how the Student should decide which “hands on” field to pursue, or the steps that are necessary to pursue employment in such field. The March IEP also does not adequately incorporate the detailed suggestions of in particular the suggestions to provide outcome-based transition goals and objectives in the areas of increasing self-determination skills, postsecondary education, employment, life skills, social skills, community participation. The record suggests that these interventions are necessary for this Student, who is concerned about his future and is seeking employment at this time. To this IHO, the record also suggests that quality transition services might well encourage the Student to attend more regularly.

As a result, I agree that Respondent denied the Petitioner FAPE through its IEPs in February and March, 2013.

2. Failure to Provide MDR for In-School Suspensions.

In reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability. 5 DCMR Sect. 2510.16

If a child with a disability who is removed from the child's current placement for 10 school days in the same year in a pattern of substantially similar behavior, a change of placement may occur. 34 CFR Sect. 300.530(d)(4); 34 CFR Sect. 300.536. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the

parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability and if the conduct in question was the direct result of the LEA's failure to implement the IEP.

The District of Columbia also requires, pursuant to 5 D.C.M.R. Sect. 2510.12. that the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team first considers all relevant information, including evaluation and diagnostic and results, or other relevant information supplied by the parents of the child; (2) observations of the child; (3) the child's IEP and placement; and (4) any other material deemed relevant by the IEP Team, including, but not limited to, school progress reports, anecdotal notes and facts related to disciplinary action taken by administrative personnel. The IEP team must also determine that, in relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement; that the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

The Official Comments to the Federal Regulations indicate that an “in-school suspension” is not considered part of the days of suspension addressed in Section 300.530 as long as the Student is afforded an opportunity to continue to appropriately participate in the general curriculum, continues to receive services specified on the child’s IEP, and continues to participate with nondisabled children to the extent that they would have would have in their current placement. 71 Fed. Reg. 46715 (2006). Here, there is testimony in the record that the Student would only miss one period per day due to in-school suspension. The Student would

then be provided with make-up work, which he was to complete and hand in. To this IHO, this Student was accordingly afforded an opportunity to continue to appropriately participate in the general curriculum despite the one period that he missed for certain days during the 2012-2013 school year. The record does not establish that the Student missed any special education services during this time or was denied an opportunity to participate with nondisabled children during this time. I find this claim is without merit.

3. Failure to Implement/2012 IEP.

The Student contends that DCPS failed to implement the services contained in the February 12, 2012 IEP, in particular 90 minutes a day of specialized instruction outside general education, transition services, 1 hour a week of behavioral supports, and inclusion services inside the classroom.

“Failure to implement” claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 2012 WL 548173 (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).

The record reveals that the IEP does not provide for inclusion services. Moreover, the record indicates that the IEP only provides for 30 minutes a week of behavioral support services. However, the IEP does provide for 90 minutes of specialized instruction outside of the general education setting, i.e., “resource class” instruction. The record reveals that DCPS failed to provide the Student with the 90 minutes of specialized instruction outside the general education

classroom. The record also indicates that the Student would have benefitted from the review work that a resource class might have offered him. Indeed, the Student was not promoted following the 2011-2012 school year. According to Mr. this was at least in part because the Student could not write a 5 paragraph essay. This is the sort of work that could be addressed in a resource class. While the Student's attendance issues certainly were a factor in his poor performance following the February, 2012 IEP, I agree with the Student that the failure of DCPS to provide resource class instruction for the remainder of the 2011-2012 school year and the 2012-2013 school year denied the Student a FAPE.

4. Remedy.

A. 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. 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. Specifics regarding the type of relief sought may not be required by Courts if witnesses have identified where the Student was before FAPE denial, where the Student should be after FAPE denial, the number of hours of compensatory education needed for the Student, and what program would get the student where he should be, and what it would consist of. Cousins v. District of Columbia, 2012 WL 3090265 (D.D.C. 2012).

The Student seeks three forms of compensatory education. The Student seeks 1) a summer transition program; 2) credit recovery classes; 3) a truancy assessment.

In terms of the summer transition program, the Student seeks, through 8 weeks of transition services to give the Student an idea of his career choices. Ms. testimony about the proposal indicates that will “go through the Student’s strengths and weaknesses” and eventually create a transition plan for the Student that will focus on a particular kind of career. I found Ms. testimony unclear on the parameters of this program, and the compensatory education plan is not specific in terms of what this program would offer. The plan (P-14-2) references a “summer transitional program such as Summer/Transition/Vocational Program, or other similar programs. It is unclear from this record what these programs offer, how such a program would specifically help the Student, how the programs would meet the criteria set forth in Reid, or whether these programs might be redundant with the transition assessment already conducted for the Student by (P-5) While I agree with the Student that transition services are

needed to further provide the Student with assistance in establishing a career, the proposed summer transition programs is not adequately explained in the record for this IHO to order it.

The Student also seeks an online credit recovery program. I agree with the Student that a credit recovery program is an appropriate remedy here, where the Student has failed courses and was not promoted after the 2011-2012 school year. Such a program would provide the Student with services to make up for some of the credits that the Student failed to acquire during 2011-2012 and in 2012-2013. However, it must be noted that the Student has shown a resistance to attending credit recovery classes in the past. I will therefore condition the payment of credit recovery services on regular attendance in the credit recovery class.

The Student also seeks a truancy assessment. According to Petitioner's Compensatory Education Plan (P-14), this assessment is to be designed for analysis of the reasons behind the Student's difficulties in getting to school. This assessment should then provide data that can allow a behavioral intervention plan to be conducted. A school engagement coach will then devise an intervention plan and monitoring system to ensure that the Student will improve his attendance at school. I agree that this proposed assessment and plan, akin to an FBA and BIP, would address the Student's deprivation of FAPE and would allow the Student to make up for the time period that denied a FAPE in 2011-2012 and 2012-2013.

In sum, I will award Petitioner compensatory education in the form of a truancy assessment and plan, and credit recovery services that will allow the Student to receive an additional credit for graduation.

B. School B.

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements.

First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider “all relevant factors” including the nature and severity of the student’s disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

Here, there is testimony in the record that the Student does not want to go to a private school. Additionally, annexed to the _____ Inc. assessment, is a statement from the Student that he likes where he lives because it is close to school. Moreover, the testimony in the record does not establish that School B has any clear protocol on how to address students who do not attend regularly. Though the _____ report recommends “intensive attendance monitoring, mentoring, after-school activities, tutoring, and home visits”, there is no testimony that any of these services are available at School B. Additionally, the report from _____ indicates that multiple school placements could be a cause of the Student’s difficulties. (P-5-3) Moreover, the record indicates that the Student has been functioning relatively well in general education classes as long as he attends. School B consists of self-contained classes with only special education students. Accordingly, to this IHO, placement at School B would not be in compliance with the IDEA mandate to place Students in the least restrictive environment. N.T. v. District of Columbia, 839 F. Supp.2d 29, 34-36 (D.D.C.

2012)(affirming an HOD denying a tuition award on, inter alia, LRE grounds, notwithstanding a finding of FAPE denial)

Under the circumstances, this IHO finds that School B would not be an appropriate placement for the Student for the forthcoming school year.

ORDER

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

1. Respondent is adjudged to have denied the Student a FAPE by: a) failing to provide special education services as recommended in the February, 2012 IEP; b) failing to create an appropriate truancy plan and appropriate transition services for the Student in the IEPs dated February, 2013 and March, 2013;
2. Respondent is directed to pay _____ Inc. for a credit recovery program allowing the Student to obtain one credit, conditional on the Student's regular attendance at the program;
3. Any and all absences from the _____ program must be documented by a note from a physician, and such medical note shall be provided to Respondent within 3 business days of the absence date;
4. If Petitioner fails to provide a medical note relating to such absence date to Respondent so that Respondent receives it within 3 business days of the absence date, funding for _____ may be terminated by Respondent;
5. Respondent is directed to pay _____ Inc. to conduct a Truancy assessment and a corresponding Behavioral Intervention Plan;
6. After such plan is compiled, Respondent shall reconvene the IEP and prepare an IEP which takes into full account the recommendations of such plan;
7. Such IEP shall also take into full account the transition assessment prepared by _____ Inc. in February, 2013;
8. Petitioner's other claims are hereby denied.

Dated: June 21, 2013

Michael Lazan
Impartial Hearing Officer