

**District of Columbia
Office of the State Superintendent of Education**

Office of Dispute Resolution
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Office of Dispute Resolution
August 5, 2015

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Case No. 2015-0189</p> <p>Date Issued: August 5, 2015</p> <p>Dates of Hearing:</p> <p>July 29, 2015 Hearing Room 2006</p> <p>July 30, 2015 Hearing Room 2006</p> <p>Representatives:</p> <p>Alana M. Hecht, Esq. for Petitioner</p> <p>Tanya Joan Chor, Esq. for Respondent</p> <p>Impartial Hearing Officer: Charles M. Carron</p>
---	--

HEARING OFFICER DETERMINATION

I. BACKGROUND

The Student is male, Current Age, and attends Current Grade at a public school (the “Attending School”). The Student has been determined to be eligible for special

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

education and related services as a child with a disability, Other Health Impairment (“OHI”) under the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.* based upon his Attention Deficit Hyperactivity Disorder (“ADHD”).

Petitioner claims that Respondent has denied the Student a Free Appropriate Public Education (“FAPE”) because his Individualized Education Programs (“IEP”)s were not reasonably calculated to confer educational benefit, as described in more detail in Section IV *infra*.

Respondent asserts that the Student’s IEPs were appropriate and provided FAPE.

II. SUBJECT MATTER JURISDICTION

This is a Due Process Complaint (“DPC”) proceeding pursuant to the IDEA. The Due Process Hearing (“DPH”) was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA’s implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the Hearing Officer Determination (“HOD”) pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the Student Hearing Office *Due Process Hearing Standard Operating Procedures*.

III. PROCEDURAL HISTORY

The DPC was filed May 29, 2015, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of Columbia Public Schools (“DCPS”).

On June 2, 2015 the undersigned was appointed as the Impartial Hearing Officer.

On June 9, 2015, Respondent filed its Response, one day past the statutory deadline, stating, *inter alia*, that Respondent has not denied the Student a FAPE.

A Resolution Session Meeting (“RSM”) was held on June 9, 2015 but it failed to resolve the DPC.

On June 9, 2015 Respondent filed a motion for a more definite statement.

On June 10, 2015 Petitioner filed an opposition to Respondent’s motion for a more definite statement.

On June 12, 2015, the undersigned issued an Order denying Respondent’s motion for a more definite statement for the reasons stated in the Order.

The undersigned held a Prehearing Conference (“PHC”) by telephone on June 17, 2015, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by July 21, 2015 and that the DPH would be held on July 28 and 29, 2015. The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on June 18, 2015.

The statutory 30-day resolution period ended on June 28, 2015.

The 45-day timeline for this HOD started to run on June 29, 2015 and will conclude on August 12, 2015.

On July 21, 2015 Petitioner filed her five-day disclosures, comprising a cover letter with lists of witnesses and documents, and 41 proposed exhibits numbered P-1 through P-41.

On July 21, 2015 Respondent filed its five-day disclosures, comprising a cover letter with lists of witnesses and documents, and 26 proposed exhibits numbered R-1 through R-26.

No other motions were filed by either party.

The morning of July 28, 2015, the DPH was postponed one day due to illness of a family member of one party’s counsel.

The DPH was held on July 29, 2015 from 9:44 a.m. to 5:35 p.m. and on July 30, 2015 from 9:37 a.m. to 3:27 p.m., in Room 2006 at the Office of Dispute Resolution, 810 First Street, NE, Washington, DC 20002.

Petitioner elected for the hearing to be closed.

Petitioner participated in the DPH in person.

At the DPH, the following documentary exhibits were admitted into evidence without objection: Petitioner's Exhibits P-1, P-3, P-5 through P-7, P-10 through P-14, P-16 through P-20, P-22 through P-34, P-36, P-37, and P-41; and Respondent's Exhibits R-1, R-2 pages 1 and 2, R-3 through R-17, and R-19 through R-26.²

The following documentary exhibits were admitted into evidence over Respondent's objections for the reasons stated on the record at the DPH: P-2, P-4, P-8, P-9, P-15, P-21, P-35, and P-38 through P-40.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Community Support Worker, First Home Care ("Community Support Worker");
- (b) Center Director, Lindamood-Bell Learning Processes ("Center Director");
- (c) Petitioner;
- (d) Senior Educational Advocate, who was admitted without objection as an expert in educational programming for students with disabilities; and
- (e) Private School IEP Coordinator.

The following witnesses testified on behalf of Respondent at the DPH:

- (a) Special Education Coordinator ("SEC") and
- (b) Assistant Principal.

The parties gave oral closing arguments and did not file written closing arguments or briefs.

² Respondent withdrew pages 3 through 5 of R-2, and R-18.

IV. ISSUES

As discussed at the PHC and confirmed in the PHO, the following issues were presented for determination at the DPH:

(a) On March 24, 2014, did Respondent deny the Student a FAPE because the IEP developed that day (i) failed to provide sufficient hours of specialized instruction in the outside of general education setting and/or (ii) eliminated direct Occupational Therapy (“OT”) services without sufficient supporting data?

(b) On November 24, 2014, did Respondent deny the Student a FAPE because Respondent failed to revise the IEP when the team met that date, even though the data available to the team supported that the Student required, at a minimum, an increase in specialized instruction outside of the general education setting, a more restrictive placement along the continuum of alternative placements, and direct OT services?

(c) On January 26, 2015, did Respondent deny the Student a FAPE because Respondent failed to revise the IEP when the team met that date, even though the data available to the team supported that the Student required, at a minimum, an increase in specialized instruction outside of the general education setting, a more restrictive placement along the continuum of alternative placements, and direct OT services?

(d) In March 2015, did Respondent deny the Student a FAPE because the IEP developed that month (i) failed to increase the hours of specialized instruction outside the general education setting in response to his lack of progress, and/or

(ii) failed to place the Student in a more restrictive placement along the continuum of alternative placements that would provide him with increased one-on-one support?³

V. RELIEF REQUESTED

Petitioner requests the following relief:⁴

- (a) findings in Petitioner's favor on all issues;
- (b) an Order that Respondent issue a Prior Written Notice within 15 school days of the HOD placing and funding the Student's attendance, with transportation, at Private School;
- (c) an Order that Respondent convene the Student's IEP Team within 15 days of the HOD to revise the Student's IEP as follows: (i) to provide 31 hours per week of specialized instruction in the outside of general education setting, (ii) to identify the Student's Least Restrictive Environment ("LRE") as a separate special education day school capable of addressing both academic and behavior

³ In the DPC, Petitioner also asserted that the IEP developed in March 2015 denied the Student a FAPE because it failed to include direct speech and language services; however, Petitioner withdrew this issue with prejudice at the DPH.

⁴ In the DPC, Petitioner also sought an Order requiring Respondent to amend the Student's IEP to include goals in the area of speech and language and provide at least 30 minutes per week of direct speech-language services; however, based upon an IEP amendment effective June 9, 2015, Petitioner withdrew this request for relief at the DPH. In the compensatory education plan filed July 21, 2015 as part of Petitioner's five-day disclosures, Petitioner sought, *inter alia*, 25 hours of OT. At the PHC, Petitioner had not identified OT as an element of compensatory education, and the statement in the PHO of the relief sought in this case did not include OT. Accordingly, because Respondent was not on notice of the need to defend against a request for compensatory OT, the undersigned struck this tardy request for relief on the record at the DPH.

needs, and (iii) to make any other changes the Hearing Officer determines to be required; and

(d) an Order requiring Respondent to fund the Student's participation in a 175 to 200 hour Lindamood-Bell reading program, or an Order of such compensatory education as the Hearing Officer determines.

VI. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VII. CREDIBILITY

SEC was not credible. She repeatedly evaded answering the questions posed to her despite the undersigned's repeated instruction to do so. At times she provided an answer that upon questioning by the undersigned she admitted lack of knowledge or recollection. SEC testified that the Lindamood-Bell evaluation was "excessive" because it comprised 14 assessments given in one four-hour session⁵ whereas Respondent conducts assessments over multiple days for a more reliable and valid measure. She also challenged Lindamood-Bell's use of the Peabody vocabulary assessment as outdated and

⁵ In fact, the assessments were conducted in three and a half hours, broken up by breaks, according to the testimony of the Lindamood-Bell Center Director, during which SEC was present.

inappropriate for children in urban settings. However, on cross examination, SEC acknowledged that the results of the Lindamood-Bell evaluation were consistent with all other evaluations of the Student. Thus, the undersigned finds that SEC's testimony attempting to discredit the Lindamood-Bell assessment was intentionally misleading. SEC maintained steadfastly that the Student's current placement is the most appropriate for him, minimizing or dismissing all evidence to the contrary. SEC gave the following reasons for maintaining the Student's current Least Restrictive Environment ("LRE"): that he benefits from non-disabled peers modeling appropriate language and behavior, that he benefits from non-disabled peers helping him with his work, that he has more access to the Common Core Curriculum in the general education classroom because he hears teachers or peers reading aloud, that he has a difficult time making friends that will be remediated by access to non-disabled peers, and that he benefits from attending his neighborhood school with his siblings. These reasons rang hollow, given the Student's serious behavior problems and anxiety caused by embarrassment at having peers try to help him, which SEC admitted on cross-examination. If SEC's rationale for retaining the Student in a mixed setting (*i.e.*, general education with "pull-out" for specialized instruction and services) were sound, no child ever would have a more restrictive placement. Upon examination by the undersigned, SEC testified that a teacher or staff member had told her that the Student should be in a self-contained classroom, but when asked who that teacher or staff member was and when the statement was made, SEC said she could not recall. Given SEC's demeanor during that questioning, the undersigned doubts her lack of recall. SEC testified that the IEP Team determines a child's LRE, but on cross examination she admitted that under DCPS policy the IEP Team lacks the

authority to determine a child’s placement beyond the point on the LRE spectrum⁶ that would require a transfer to another school. That constraint on the ability of a DCPS IEP Team to determine the appropriate placement for a child—which violates the provisions of IDEA governing the role of an IEP Team—may explain, but does not excuse, SEC’s lack of candor. For all of the above reasons, the undersigned has given no weight to SEC’s testimony when it conflicted with other evidence in the record.

The undersigned found all of the other witnesses to be credible, to the extent of their firsthand knowledge or professional expertise.

VIII. FINDINGS OF FACT⁷

Facts Related to Jurisdiction

1. The Student is a male of Current Age. P-17-1.⁸
2. The Student resides in the District of Columbia. *Id.*
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with OHI based upon his ADHD. *Id.*

⁶ According to SEC, under DCPS policy, any IEP requiring more than 19.5 hours per week of specialized instruction in the outside of general education setting requires that a Student be placed in a “self-contained classroom,” which is a more restrictive setting than Attending School can provide. Testimony of SEC.

⁷ The record includes documentary evidence relating to years prior to the events challenged in the DPC that are immaterial to deciding the issues in the instant case; accordingly, those documents, including the Student’s May 2012 assessments and evaluations (P-24 through P-28) and his progress reports and report cards from school years 2011-2012 and 2012-2013 (portions of P-3-1 and P-23) have not been summarized in this HOD.

⁸ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

May 17, 2013 IEP

4. The Student's May 17, 2013 IEP provided five hours per week of specialized instruction in the general education setting, 10 hours per week of specialized instruction in the outside of general education setting, 120 minutes per month of OT in the outside of general education setting, and 120 minutes per month of behavioral support services in the general education setting. P-6-9a.

The Student's Progress from May 17, 2013 to March 24, 2014

5. From May 17, 2013 to March 24, 2014, the Student made the following progress in Mathematics: (a) He progressed from recognizing and sequencing numbers 0-20 with minimal prompting to doing the same with numbers 0-50; (b) he progressed from writing numbers 0-20 dictated to him in sequence and out of order with minimal prompting to doing the same with numbers 0-50; (c) he gained the ability to skip count by 10's to 100 independently, and by 5's with minimal visual cues; (d) he gained the ability to apply counting by 5's to telling time and to read an analog clock at 15-minute intervals with minimal support; (e) he progressed from being unable to read, understand and solve simple word problems to beginning to use the support of a list of steps to guide his thinking when a word problem was read to him; and (f) he had become engaged and a consistent participant in small group instruction, persevering through challenging math tasks without giving up or having a "meltdown." *Compare* P-7-2 with P-6-3. However, the Student continued to need constant repetition of learned material, many hands-on learning activities, and modified content to master basic math skills. *Id.*

6. From May 17, 2013 to March 24, 2014, the Student made the following progress in Reading: (a) He progressed from reading at Fountas and Pinnell level A independently to reading at level B independently; (b) he improved from reading consonant-vowel-consonant (“CVC”) words from 0% correct to 70% correct; (c) his recognition, categorization, and usage of correct vowel sounds improved from approximately 20% to 75%; and (d) he progressed from reading 16 sight words in isolation and in context to reading 29 of 32 sight words in isolation and in context. *Compare P-7-3 with P-6-4.* However, the Student continued to need constant repetition and one on one teaching. *Id.*

7. From May 17, 2013 to March 24, 2014, the Student made the following progress in Written Expression: He demonstrated a high level of improvement and success when spelling individual words and gained the ability to compose short sentences; however, he continued to show unwillingness to write independently and became frustrated quickly if not provided one on one support. *Compare P-7-4 with P-6-6.*

8. From May 17, 2013 to March 24, 2014, the Student made the following progress in Motor Skills/Physical Development: He mastered his goals⁹ at a level between 75% to 95% and no longer required breaks and other activities while in class. *Compare P-7-5 with P-6-8.* He was able to form all upper-case letters with 95% accuracy

⁹ Contrary to Petitioner’s assertion, the Motor Skills/Physical Development goals in the Student’s May 17, 2013 IEP were not limited to handwriting; rather, those goals also included the following: creating a list of preferred sensory-based activities, including the use of adaptive equipment for use in the classroom; while in the classroom, appropriately requesting participation in a sensory-based activity, break, or piece of equipment; writing five sentences of five words each, of his own creation, with correct spacing and directionality of letters; and using a “thumb up” position when manipulating scissors with his dominant hand to cut age appropriate shapes. P-6-8 and -9.

and lower-case letters with 85% accuracy with cues for directionality and maintaining spacing. P-28-1 and -2.

9. During the second advisory of SY 2013-2014, the Student did “*a fantastic job* of improving his behavior. He is able to focus and learn with his peers during instruction. This will show as an immense amount of growth this year in his academics.” P-3-10 (emphasis in original).

10. As of March 4, 2014, the Student’s personal and social skills were “Developing.” P-3-11. These skills comprised completing homework assignments, completing class work in a timely manner, following directions in class, supporting and working well with others, and being respectful of the classroom environment, staff, and other students.” *Id.*

11. There is no other evidence in the record of the Student’s social-emotional progress, or any failure to make progress, between May 17, 2013 and March 24, 2014 because the relevant page of the Student’s March 24, 2014 IEP was omitted from Petitioner’s disclosure (*see*, P-7, missing IEP Page 8) and Respondent did not introduce that IEP.

12. The fact that the Student’s report cards for the third term of SY 2012-2013 (P-23-3 through -5) and the third term of SY 2013-2014 (P-23-7 through -10) show that the Student remained at the “Beginning” level in many areas, and “Below Basic” on knowledge of many skills and concepts does *not* mean that he was failing to progress, because he had advanced from first grade to second grade and the marks for SY 2013-2014 reflected his performance on the second-grade curriculum or standards.

13. Based upon the entire record, the undersigned finds that the Student made meaningful progress in all academic areas, in his motor skills/physical development, and in his social-emotional development between May 17, 2013 and March 24, 2014.

March 24, 2014 IEP

14. The Student's March 24, 2014 IEP increased the Student's specialized instruction in the outside of general education setting from 10 hours to 15 hours per week, changed the setting of the Student's 120 minutes per month of behavioral support to outside of general education, changed the Student's OT from 120 minutes per month of direct services to 15 minutes per month of consultation, and reduced the Student's specialized instruction in the general education setting from five hours to 2.5 hours per week. P-7-6, P-8-4, P-11-1.

15. Because the Student was making progress in all academic areas under his May 17, 2013 IEP, the undersigned finds that the overall increase in hours of specialized instruction, whether or not needed, was reasonably calculated to confer educational benefit.

16. Because the Student had substantially achieved the Motor Skills/Physical Development goals in his May 17, 2013 IEP and there is no evidence in the record that he continued to have deficits in those areas,¹⁰ the undersigned finds that the substitution of 15 minutes of consultative OT services for 120 minutes of direct OT services did not

¹⁰ Petitioner asserts that direct OT services were discontinued without an evaluation having been conducted. No provision of IDEA or its implementing regulations requires any formal evaluation as a precondition of revising, or even eliminating, so-called "related services" including OT. Changing or eliminating a related service is not the same as "exiting" a child from special education.

render the Student's IEP inappropriate; rather, it remained reasonably calculated to confer educational benefit.

17. Moreover, there is no evidence in the record that Petitioner disagreed with the amendments to the IEP, including the substitution of consultative for direct OT services, further supporting the appropriateness of that change.¹¹

The Student's Progress from March 24, 2014 to November 24, 2014

18. There is no evidence in the record that the Student made or failed to make academic progress between March 24, 2014 and the end of SY 2013-2014.

19. The Student was scheduled to attend Extended School Year ("ESY") during the summer of 2014; however, he made little progress due to absences. Testimony of SEC.

20. There is no evidence in the record that the Student made or failed to make academic progress from the beginning of SY 2014-2015 to November 24, 2014.¹²

21. With regard to personal and social skills, the Student's teacher spoke with Petitioner and the Student's step-father in person on September 5 and 17, 2014 regarding

¹¹ A subsequent OT evaluation (P-28) determined that the Student did still have motor skills and physical development deficits requiring direct OT services. However, IEPs are judged prospectively based upon information available to the IEP Team at the time.

¹² The fact that the Student's report cards for the first term of SY 2013-2014 (P-23-7 through -10) and the first term of SY 2014-2015 (P-23-17 and -18) show that the Student remained at the "Beginning" level in many areas, and "Below Basic" on knowledge of many skills and concepts does *not* mean that he was failing to progress, because he had advanced from second grade to third grade and the marks for SY 2014-2015 reflected his performance on the third grade curriculum or standards.

the Student's work habits in class and his behavior. R-3-9 and -11. The content of those discussions is not in the record.

22. As of September 26, 2014, the Student was at the "Beginning" level on completing homework assignments, completing class work in a timely manner, following directions in class, and supporting and working well with others; and his teacher believed he needed to spend less time playing and off task. P-3-13.

23. The Student's teacher attempted unsuccessfully to call Petitioner on October 10, 2014 regarding the Student's behavior and work habits. R-3-12.

November 24, 2014 IEP Team Meeting and Subsequent Related Correspondence

24. At an IEP Team¹³ Meeting on November 24, 2014, Petitioner expressed her concern that the gap between the Student and his peers was widening (P-8-2); however, there is no evidence in the record that any gap between the Student and his peers was widening.

25. Petitioner described the Student's deficiencies in reading (*Id.*), while the Student's English Language Arts teacher described the progress the Student was making in reading (P-8-2 and -3).

26. The Team discussed the Student's progress and difficulties in math and reading. P-8-3 and -4.

27. According to Senior Educational Advocate, Petitioner said that she was being called quite frequently because of the Student's behaviors (Testimony of Senior

¹³ The sign-in sheet for the meeting (P-8-1) characterizes it as a "Multi-Disciplinary Team Meeting." The parties use the terms Multi-Disciplinary Team ("MDT") and IEP Team interchangeably. The distinction is not material to determination of the issues in the instant case.

Educational Advocate); however, Petitioner testified that she was called only four times during the entire school year (Testimony of Petitioner).

28. Based upon the entire record, the undersigned finds that Petitioner has not met her burden of persuasion that as of November 24, 2014, the Student was failing to make academic progress.

29. The Team discussed that the Student's direct OT services had been changed to consultation and that no evaluation had been conducted. P-8-4, testimony of Senior Educational Advocate.

30. Senior Educational Advocate stated that an OT evaluation was required because the Student continued to demonstrate an excessive activity level, inability to remain seated and multi-sensory processing problems, and that the Student would benefit from OT for sensory integration to help him focus. Testimony of Senior Educational Advocate.

31. Other than Senior Educational Advocate's opinion, there is no evidence in the record that as of November 24, 2014, the Student required goals for motor skills or physical development, or services to achieve those goals, in order to access the general education curriculum.

32. Senior Educational Advocate asked for a "full time IEP" (P-8-5) by which she meant assignment of the Student to a self-contained classroom where he would receive all of his instruction (Testimony of Senior Educational Advocate).¹⁴

¹⁴ Senior Educational Advocate uses the term "setting" to refer not only the distinction between general education and outside of general education, but also to distinguish between (a) specialized instruction provided when a child is taken from a general education classroom to a resource room with a different teacher for a period of time, and (b) specialized instruction provided the entire school day by the same teacher in a

33. Based upon the entire record, the undersigned finds that Petitioner has not met her burden of proving that, as of November 24, 2014, the Student's March 24, 2014 IEP was not reasonably calculated to provide educational benefit.

34. On December 21, 2014 Senior Educational Advocate sent Respondent a letter summarizing the Student's academic and behavior difficulties and requesting, *inter alia*, restoration of direct OT services and a "full time" (*i.e.* 31 hours per week) special education program outside the general education setting at a separate therapeutic day school.

35. On January 9, 2015, SEC responded, requesting a meeting (P-2-19), which subsequently was confirmed for January 26, 2015.

The Student's Progress from November 24, 2014 to January 26, 2015

36. The fact that the Student's report cards for the second term of SY 2013-2014 (P-23-7 through -10) and the second term of SY 2014-2015 (P-23-17 and -18) show that the Student remained at the "Beginning" level in many areas, and "Below Basic" on knowledge of many skills and concepts does *not* mean that he was failing to progress, because he had advanced from second grade to third grade and the marks for SY 2014-2015 reflected his performance on the third grade curriculum or standards.

37. However, on standardized testing administered September 19, 2014 and January 13, 2015, the Student remained at Level K (*i.e.*, *kindergarten*, *see*, P-11-2) on common core math instruction (P-36-1 through -9), indicating no progress.

classroom with no non-disabled children. Testimony of Senior Educational Consultant. Confusingly, Senior Educational Consultant refers to both of these approaches as "pull-out." *Id.*

38. With regard to the Student's personal and social skills, as of December 16, 2014, the Student remained at the "Beginning" level, and his teacher noted the following:

[The Student's] behavior has been extremely difficult to manage over the course of the last month. He is having a very difficult time staying focused and on task. As a result, he has become a huge distraction to others and does not seem to care when consequences are issued.

P-3-14.

39. On January 22, 2015, the Student's teacher sent Petitioner a text message regarding the Student's classroom behavior and work habits. R-3-15. The content of the message is not in evidence.

January 26, 2015 IEP Team Meeting

40. The Student's IEP Team met on January 26, 2015. Testimony of Senior Educational Advocate.

41. Petitioner expressed her concerns about the Student's inability to focus, sit down or listen. P-9-1.

42. The Team discussed Petitioner's requests for (a) an increase in reading support because the Student had regressed from level C to level B; (b) increased mathematics support; (c) educational, comprehensive psychological, and speech-language evaluations; and (d) additional educational records. P-9-1, testimony of Community Support Worker.

43. Because the evaluations that Petitioner had requested had not been completed, the Team agreed to reconvene when those evaluations were complete. Testimony of Community Support Worker.

44. Based upon the entire record, the undersigned finds that, whether or not the Student's IEP should have been amended at the January 26, 2015 meeting, Petitioner agreed to defer any amendment until the subsequent meeting after the completion of the evaluations.

January 29, 2015 Analysis of Existing Data

45. On January 29, 2015, Respondent developed an Analysis of Existing Data ("AED"). P-11.

46. The Student was performing below grade level expectation in Mathematics, testing three grades below Current Grade, and had made very little progress. P-11-2.

47. The Student was performing far below grade level expectation in Reading although his comprehension had increased from Level B to level C.¹⁵ P-11-2 and -3.

48. The Student had made minimal progress in Written Expression. P-11-3.

49. Although the Student was friendly and outgoing and had developed positive relationships with peers and adults at school, he demonstrated an inability to focus and attend to classroom activities and work; he was "highly distractible, needs frequent prompting to remain on task ... with the need for frequent movement breaks"; he frequently displayed emotional distress and pent up frustration; and he would shut down if upset or distressed. P-11-5.

50. The Student's motor skills and physical development were characterized by difficulty with letter spacing and reversal of letters; mixing upper and lower case letters;

¹⁵ The Student's comprehension level had been C at the end of SY 2013-2014, but he had regressed to B over the summer. P-11-3.

an inappropriate pencil grip; significant difficulty understanding directions on a left-right reversal test; and deficits with handwriting skills. *Id.*

January 29, 2015 OT Assessment

51. On January 29, 2015, Occupational Therapist conducted an OT assessment of the Student, with a report dated February 8, 2015 (P-28-1) and a signature line dated March 21, 2015 (P-28-8).

52. The Student demonstrated moderate difficulty in visual closure (imagining what a figure will look like when it is completed) and spatial awareness, and significant difficulties in handwriting and visual perception of upper and lower case letters and number directionality. P-28-6 and -7.

53. Occupational Therapist concluded that the Student's deficits for letter and number recognition "will directly and significantly affect his ability to participate in academic tasks requiring reading, spelling, writing (physical and creative), and math...." P-28-7.

February 19, 2015 Proposed IEP Amendment

54. On February 19, 2015, Respondent proposed to amend the Student's IEP without convening an IEP Team meeting, to provide an additional accommodation for testing, *i.e.*, extended time and repetition of directions. P-12-1.

55. The record does not indicate whether Petitioner agreed to the proposed amendment or whether it was implemented.

56. Also on February 19, 2015, Respondent proposed, and Petitioner agreed on February 27, 2015, to amend the Student's IEP without convening an IEP Team meeting, to provide additional accommodations for testing, *i.e.*, extended time, calculator, breaks, and repetition of directions, and to add ESY services. R-12-1.

57. There is no explanation in the record for the overlap between the two proposals, *i.e.*, extended time and repetition of directions.

February 10 through March 12, 2015 Comprehensive Psychological Reevaluation

58. From February 10 through March 12, 2015, School Psychologist conducted a comprehensive psychological reevaluation of the Student, with a report dated March 12, 2015. P-32.

59. The evaluation was based upon a review of the Student's educational and evaluation records, interviews with Petitioner and the Student, questionnaires completed by Petitioner and one of his teachers, observation of the Student, and testing. *Id.*

60. The Student's global intellectual functioning was found to be in the Below Average range, ranked in the ninth percentile, consistent with prior testing. P-32-5.

61. On academic testing, the Student's scores fell in the Low range for Broad Reading and Broad Math and the Very Low range for Broad Written Language. P-32-6 and -7.

62. Social-emotional testing confirmed the Student's diagnosis of ADHD. P-32-7 through -9.

63. School Psychologist concluded that the Student continued to display "high levels of behaviors associated with ADHD in the school and home environment,

including inattention, hyperactivity, and impulsivity” as well as a weakness in executive functioning skills. P-32-9 and -10.

March 4, 2015 Psychiatric Assessment

64. A psychiatric assessment of the Student on March 4, 2015 confirmed the diagnosis of ADHD Combined Type. P-29-1 and -2.

March 11, 2015 Functional Behavioral Assessment

65. On March 11, 2015, Social Worker prepared a Functional Behavioral Assessment (“FBA”) of the Student. P-30.

66. The FBA was based upon reports from Petitioner and the Student’s teachers, the Student’s educational and evaluation records, and observations of the Student on February 19, March 9 and March 11, 2015 by Social Worker. *Id.*

67. Social Worker observed the Student in his music class (in the general education setting), failing to follow teacher directions to sit down and stop talking. P-30-4.

68. Social Worker observed the Student in his special education class with six other children, and he sat patiently, did his work, and remained engaged despite distractions. *Id.*

69. Social Worker observed the Student in his English Language Arts class with 15 other students and two teachers, and he stayed in his seat engaged in his work. *Id.*

70. Overall, Social Worker observed the Student to be engaged in appropriate behaviors 73% of the time, inattentive 20% of the time, and non-compliant 6% of the time. P-30-6.

71. Despite being engaged in appropriate behaviors 73% of the time, the Student was reported to be off task 92% of the time, inattentive, consistently out of seat, wandering the classroom, and not completing work or attempting to do so, all of which interfered with his ability to access the general education curriculum. P-30-1 and -3.

72. The Student was reported to work well when receiving one on one support or in a small group setting. P-30-2.

73. The Student's behaviors of concern occurred throughout the school day, mostly in the morning however, and more frequently in larger group settings, transitions, lunch and recess. *Id.*

74. Social Worker opined that the Student engaged in these behaviors to obtain attention and to escape tasks he did not want to perform. P-30-3.

March 11 or 12, 2015 Draft Behavior Intervention Plan

75. On March 11, 2015 (P-31-1) or March 12, 2015 (P-31-2), Social Worker drafted a Behavior Intervention Plan ("BIP") for the Student.

The Student's Progress from March 24, 2014 to March 16, 2015

76. The Student's report cards for the third term of SY 2013-2014 (P-23-7 through -10) and the third term of SY 2014-2015 (P-23-17 and -18) show that the Student remained at the "Beginning" level in many areas, and "Below Basic" on knowledge of

many skills and concepts. The report cards do not demonstrate that the Student was failing to progress, because he had advanced from second grade to third grade and the marks for SY 2014-2015 reflected his performance on the third grade curriculum or standards. At the same time, the report cards do not demonstrate academic progress.

77. However, the report cards do demonstrate significant regression in the Student's work habits, personal and social skills, with the Student rarely demonstrating the appropriate skills that he had independently demonstrated the previous year.

Compare P-23-6 with P-23-17.

78. From March 24, 2014 to March 16, 2015, the Student was not progressing in Mathematics; at least one of his annual goals remained the same from year to year.

Compare P-17-3 with P-7-2.¹⁶ The Student regressed over the winter break. R-7-1. On standardized testing administered September 19, 2014, January 13, 2015, and April 24, 2015, the Student remained at Level K on common core math instruction (P-36-1 through -12), indicating no progress.

79. From the beginning to the middle of SY 2014-2015, the Student made the following progress in Reading: (a) His Total Reading Comprehension ("TRC") increased from level B to level C;¹⁷ (b) his reading fluency score increased from 11/70 words per minute to 23/86 words per minute; (c) his reading accuracy score increased from 42%/95% to 59%/96%; and (d) his blending of sounds when reading CVC words

¹⁶ The page of the March 24, 2014 IEP with the remaining math goals was not included in Petitioner's disclosure (*see*, P-7, missing IEP Page 4) and Respondent did not introduce this document.

¹⁷ By the end of SY 2014-2015, the Student had regressed to Level B. P-37-4. This is not material to determination of the issues in the instant case because IEPs are judged prospectively based upon information available at the time. However, events occurring after the filing of a DPC may bear on the appropriate remedy for a denial of FAPE.

improved from 0% correct to 70% correct. P-17-4. However, he continued to need high levels of support. *Id.*

80. From September 9, 2014 to January 8, 2015, the Student's ability to read sight-words increased from mastery of four word groups to eight word groups. R-5-1.

81. From March 24, 2014 to March 16, 2015, the Student demonstrated improvement and success when spelling individual words during class practice activities, and he gained the ability to compose short sentences (up to five words) that had primarily a limited set of high frequency words and up to two decodable words when the sentence was repeated to him several times. P-17-6.

82. However, the Student continued to have difficulty expressing himself through writing and became frustrated if not provided one on one support. *Id.*

83. From March 24, 2014 to March 16, 2015, the Student had a decreased number of referrals for school discipline and an increased ability to remain in the classroom; however, he continued to have issues with concentration, hyperactivity and concentration. P-17-7 and -8.

84. Based upon the entire record, the undersigned finds that the Student did not make meaningful academic progress from March 24, 2014 to March 16, 2015 and that his behavior remained a significant impediment to his ability to access the general education curriculum.

March 16, 2015 IEP Team Meeting

85. The Student's IEP Team met on March 16, 2015 to review the Student's recent evaluations, update his eligibility, and review and revise his IEP. P-17, R-17.

86. The Team reviewed the Student's cognitive and academic testing scores. P-15-1, R-17-2.

87. The Team determined that the Student remained qualified for special education as a student with OHI based upon his ADHD. P-14-1, R-17-5, R-19-1.

88. The Team discussed the Student's classroom performance and his almost constant need for one on one attention to complete work. R-17-4.

89. The Team discussed the Student's behavior issues, specifically that although he had a decrease in behavior referrals since SY 2013-2014 (R-17-5), the Student was off-task, inattentive, had difficulty focusing, had difficulty listening and following through with directions, and could only sit for four or five minutes at a time. P-15-1 and -4, R-17-2 and -3.

90. The Team reviewed the draft BIP. P-15-1, R-17-3.

91. Senior Educational Consultant expressed concerns about the BIP because the goals were the same as those in the Student's IEP and she did not consider them to be true strategies or interventions to address the Student's behavior issues. P-15-1 and -2, R-17-3, testimony of Senior Educational Consultant. The Team agreed to revisit the BIP in six weeks. R-17-3.

92. Based upon the entire record, the undersigned finds that the BIP lacked any new interventions¹⁸ and therefore was not reasonably calculated to improve the Student's behavior.

¹⁸ At the time the FBA was prepared, the Student already was receiving Positive Behavior Intervention Strategies ("PBIS"). Testimony of SEC.

93. The Team reviewed the Student's OT evaluation (P-15-2 and -3, R-17-4) and revised his IEP to add 120 minutes per month of direct OT services in the outside of general education setting. P-17-11.

94. The Team discussed the Student's Present Levels of Performance ("PLOPs") in math, reading and writing. R-17-5.

95. The Team added 2.5 hours per week of specialized instruction in the general education setting and made no changes to the Student's hours of behavioral support services and specialized instruction in the outside of general education setting. Testimony of SEC.

96. The Student therefore continued to receive 15 hours per week of specialized instruction in the outside of general education setting, meaning a "resource room" with up to 12 students being taught different curricula by two "case managers." *Id.*

97. Based upon the entire record, the undersigned finds that as of March 16, 2015, the Student's academic progress was minimal, that his behavior due to his ADHD interfered with his access to the general education curriculum (albeit to a lesser extent in small group or on-on-one specialized instruction) and caused disruptions throughout the school day in all settings, including lunch, recess, and transitions; that adding more hours of specialized instruction in the general education setting and/or in the outside of general education setting of a "resource room" was not reasonably calculated to provide educational benefit to the Student because the previous increases in such hours were not providing educational benefit; and that the Student therefore required a separate special

education school or program to access the general education curriculum.¹⁹

98. Accordingly, the undersigned finds that as of March 16, 2015, the Student's IEP failed to be reasonably calculated to confer educational benefit.

March 16, 2015 Evaluation Summary Report and Final Eligibility Determination Report

99. On March 16, 2015, Respondent issued an Evaluation Summary Report, summarizing the recent assessments (P-16) and a Final Eligibility Determination Report, finding that the Student continued to be eligible for special education and related services as a child with OHI based upon his ADHD (P-18).

June 9, 2015 IEP Amendment and Subsequent Related Correspondence

100. At the RSM on June 9, 2015, Respondent agreed to amend the Student's IEP, *inter alia*, to increase the Student's hours of specialized instruction in the outside of general education setting to 19.5 per week. P-19-1.

101. Petitioner stated that she disagreed with the amendment but wanted the additional services implemented "for now." P-19-3.

102. Petitioner and her counsel disagreed with the IEP, as amended. P-20-1.

103. On June 10, 2015 Senior Educational Advocate emailed SEC stating, *inter alia*, that the hours of specialized instruction should be 20 rather than 19.5 which would trigger a change in the Student's Location of Services ("LOS") to a "separate day school"

¹⁹ The Student could be expected to engage in inappropriate behaviors initially at a separate special education school; however, those behaviors would be expected to dissipate based upon the systematic and consistent behavior modification approach applied in such a setting. Testimony of Senior Educational Advocate.

because Attending School cannot provide 20 hours per week of specialized instruction in the outside of general education setting. P-2-43, testimony of SEC.

104. Based upon the entire record, the undersigned finds that the Student's IEP, as amended on June 10, 2015, did not fully remediate the deficiencies described in Findings of Fact 92 and 97, *supra*, because the Student required placement at a separate special education day school. Finding of Fact 97.

Separate Special Education School or Program Within DCPS

105. Assistant Principal, who previously had been a manager on a resolution team within the compliance division of Respondent's Office of Specialized Instruction, testified credibly that Respondent has public schools that can implement "full time" IEPs, *i.e.*, with the student having no contact with non-disabled peers at any time during the school day. Testimony of Assistant Principal.

106. Senior Educational Consultant testified credibly that she had been informed on numerous occasions, although not by Assistant Principal, that Respondent had no public school that could implement more than 27.5 hours per week in the outside of general education setting, thus not segregating a student from non-disabled peers at lunch, recess and/or other times during the school day.²⁰ Testimony of Senior Educational Consultant.

107. There is no inherent inconsistency in the testimony of these witnesses. Representatives of Respondent other than Assistant Principal may have provided

²⁰ Petitioner's counsel, in her questioning of Assistant Principal, implied that Respondent's representatives, including Assistant Principal, had provided the same information to her; however, questions by counsel are not evidence.

inaccurate information to Senior Educational Consultant, or the availability of DCPS schools capable of implementing a “full time” IEP may have changed since Senior Educational Consultant last inquired.

108. It is not necessary for the undersigned to make a factual finding regarding whether there is a DCPS school that can implement an IEP requiring the Student to be placed in a school or program where he will be segregated from non-disabled peers throughout the school day. In this HOD, the undersigned orders such a placement (*see*, Section XI, *supra*). If no DCPS (*i.e.* public) school can implement such an IEP, Respondent will have to assign the Student to a non-public (*i.e.*, private) school that can.

June 17, 2015 Diagnostic Learning Evaluation at Lindamood-Bell Learning Processes

109. On June 17, 2015, the Student’s language processing and literacy skills were evaluated at Lindamood-Bell Learning Processes (“Lindamood-Bell”) a provider of reading instruction that Petitioner seeks as compensatory education in the instant case. P-35.

110. The diagnostic evaluation comprised 14 assessments of the Student’s underlying cognitive functions affecting his language and literacy development.

Testimony of Center Director.

111. The evaluation took approximately three and a half hours, including breaks provided to the Student to accommodate his ADHD. *Id.*

112. In a consultation with Petitioner, Center Director recommended 200 to 240 hours of instruction, at a frequency of four hours per day, five days per week for an initial

period of 10 to 12 weeks, as well as “an additional period of instruction to develop his mathematical computation and reasoning skills.” *Id.*, P-35-5.

113. Center Director opined that with this intervention, the Student could make one year’s worth of progress in reading. Testimony of Center Director.

114. According to Center Director, the minimum number of hours of Lindamood-Bell training that is effective is 120 hours, the minimum frequency is five times per week, and the minimum session length is two hours. *Id.*

115. Lindamood-Bell is open Saturdays, so the Student could attend four school days per week and Saturdays. *Id.*

116. Lindamood-Bell has a protocol for behavior modification for students who demonstrate inappropriate behaviors during instruction. *Id.*

117. Upon questioning by the undersigned, Center Director acknowledged that the Student had not been evaluated after a full school day and she did not know, given his ADHD, how attentive he would be for instruction after a school day. *Id.*

Private School

118. Private School is an independent private day school for children with “learning differences” in pre-kindergarten through Grade 12. P-38-18, testimony of Private School IEP Coordinator (“IEP Coordinator”).

119. All students at Private School have “full time outside of general education IEPs” covering the entire 32-hour school week. Testimony of IEP Coordinator.

120. Class size ranges from three to 12 children, typically 8 to ten. *Id.*, P-38-18.

121. OT is available at Private School. P-38-22, testimony of IEP Coordinator.

122. At Private School, the Student's ADHD would be addressed through differentiated instruction, teaching the Student strategies for cognitive self-control, task flexibility (*e.g.*, dividing a task into parts), scaffolding, and sensory menu options (*e.g.*, allowing the Student to calm himself by getting a drink of water, asking for a movement break, doing wall pushups, using a standing desk or other adaptive furniture, or using manipulatives referred to as "fidgets"). Testimony of IEP Coordinator.

123. Private School uses the Wilson reading system, which IEP Coordinator believes would be effective for the Student if he were provided intensive one-on-one support through tutoring or speech-language therapy (which are available at Private School at additional cost). *Id.*

124. At Private School, the Student would have few transitions, and would remain with his classmates at lunch and on the playground, supervised by teachers or staff at all times. *Id.*

125. Private School has "sensory gyms" with equipment appropriate to help students with sensory problems develop navigation and body planning skills. *Id.*

126. Private School is approved by the Office of the State Superintendent of Education for children with OHI. P-40-4, testimony of IEP Coordinator.

127. The Student has been accepted at Private School. P-38-1, testimony of IEP Coordinator.

128. Based upon the entire record, the undersigned finds that Private School would be an appropriate LOS for the Student. However, there is no evidence in the record that Private School is the *only* appropriate LOS for the Student.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended “(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C. §1400(d)(1), *accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a FAPE. FAPE means:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

IEP

3. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia*,

561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12

(1988)). The IDEA defines IEP as follows:

(i) In general: The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

* * *

and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications

20 U.S.C. §1414(d)(1)(A).

4. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-

handicapped children.”” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982) (“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of 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.

5. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) (“Academic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’”) (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student’s progress, courts should defer to the administrative agency’s expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (“Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP’s substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the

obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an “education ... designed according to the parent's desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while “sympathetic” to parents' frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

K.S. v. District of Columbia, 962 F. Supp. 2d 216 (D.D.C. 2013).

When an IEP Must be Revised

6. IEPs must be reviewed and revised:

Review and revision of IEPs—(1) *General*. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

34 C.F.R. §300.324(b).

7. Because by March 16, 2015, the Student ceased to make meaningful academic progress and exhibited increasingly disruptive behaviors (Finding of Fact 97), which required placement in a separate special education school (*Id.*), Respondent's failure to so amend his IEP then or subsequently (*see*, Findings of Fact 95, 96 and 100) denied the Student a FAPE.

Appropriate Relief for Denial of FAPE

8. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) ("*Reid*"). That relief may include prospective services. *Id.* In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) ("*Branham*"). As noted by the U.S. Court of Appeals for the District of Columbia Circuit:

If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an "appropriate" public school program available, *i.e.*, one "reasonably calculated to enable the child to receive educational benefits," the District

need not consider private placement, even though a private school might be more appropriate or better able to serve the child.

Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir. 1991) (internal citations omitted); *see also*, *Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) (“Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent’s desires.”) and *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (“Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”).

9. Although an inadequate IEP is a *necessary* condition for private school placement, it is not a *sufficient* condition for such placement. *N.T. v. District of Columbia*, 839 F.Supp.2d 29 (D.D.C. 2012) (“*N.T.*”). If a public school could offer a FAPE, and DCPS has not demonstrated unwillingness or inability to modify the student’s IEP, then a hearing officer may order a modification in the IEP rather than private school placement or reimbursement:

Because DCPS can craft an appropriate IEP to provide a FAPE, it is not required to pay for [the student’s private] placement.

Id., citing *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) and *School Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985) (“*Burlington*”); *see also*, *Pinto v. District of Columbia* (D.D.C. Civ. No. 12-01699 (DAR), September 29, 2014) (“*Pinto*”).

10. A determination of the appropriateness of a special education placement requires consideration of at least the following factors: (a) the nature and severity of the student’s disability; (b) the student’s specialized educational needs; (c) the link between those needs and the services offered by the school/program; (d) the cost of the placement

if it is a non-public school; and (e) the extent to which the placement represents the LRE for the Student. *Branham*.

11. In the instant case, the Student requires a separate special education program or school where he has no contact with non-disabled peers, even at lunch, at recess, and during transitions (Finding of Fact 97); however, there is no evidence in the record that an IEP with these conditions cannot be implemented at a public school.

Summary

12. On March 24, 2014, Respondent did not deny the Student a FAPE because the IEP developed that day provided sufficient hours of specialized instruction in the outside of general education setting and based upon information available to the team, the Student did not require direct OT services.

13. On November 24, 2014, Respondent did not deny the Student a FAPE because the Student's March 24, 2014 IEP continued to be reasonably calculated to provide educational benefit, and based upon information available to the team, the Student did not require direct OT services.

14. On January 26, 2015, Respondent did not deny the Student a FAPE because Petitioner and Respondent agreed to defer discussion of amendments to the Student's IEP until various evaluations were completed.

15. In March 2015, Respondent denied the Student a FAPE because the IEP developed that month failed to place the Student in a more restrictive placement along the continuum of alternative placements that would provide him with increased one-on-one

support, specifically, a separate special education school or program, which he required to access the general education curriculum.

X. COMPENSATORY EDUCATION

16. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid*.

That relief may include compensatory award of prospective services:

When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.

Id.

17. In all cases, an order of relief must be evidence-based. *Branham*.

18. Educational programs, including compensatory education, must be qualitative, fact-intensive, and “above all tailored to the unique needs of the disabled student.” *Id.*

19. Mechanical calculation of the number of hours of compensatory education (a “cookie-cutter approach”) is not permissible. *Reid*. Rather, compensatory awards “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” *Id.*

20. Awards compensating past violations must “rely on individual assessments.”

Id.

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

Id.

21. However, formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an “individually-tailored assessment.” *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (citing *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (internal quotation marks omitted)).

22. The hearing officer must base a compensatory education award on evidence regarding the student’s “specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.... In every case ... 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.”²¹ *Id.*

23. A student who was denied a FAPE may not be entitled to an award of compensatory education if “the services requested, for whatever reason, would not compensate the student for the denial of a FAPE.” *Gill v. District of Columbia*, 751 F. Supp. 2d 104 (D.D.C. 2010) (“*Gill*”).

24. Petitioner’s compensatory education request is set forth in the compensatory education plan developed by Senior Educational Advocate (the “Plan”). P-1.

25. As discussed in Section V, *supra*, the undersigned struck the request in the Plan for 25 hours of OT because that request was not timely made at the PHC, was not an element of relief recited in the PHO, and Petitioner did not challenge or seek to change the PHO.

²¹ This standard imposes a high burden on petitioners; however, the undersigned must follow controlling case law.

26. Even if the undersigned had not struck the compensatory OT request, it would fail because the 25 hours of OT were requested “to replace the 120 minutes a month for one year resulting from the removal of OT from [the Student’s] IEP” (P-1-3), *i.e.*, an hour for an hour, which is strictly prohibited by controlling case law. Moreover, the removal of direct OT services was appropriate and did not deny the Student FAPE. Conclusion of Law 13, *supra*.

27. The remaining compensatory education request, for reading instruction, is based upon the assumption that the Student was denied FAPE for one year, rather than since March 24, 2014 as asserted in the DPC. Testimony of Senior Educational Advocate. In fact, the denial of FAPE in this case occurred only from March 16, 2015 through the end of SY 2014-2015 (Conclusion of Law 15), roughly one third of the school year rather than the entire school year as assumed by Senior Educational Advocate or one and a third school years as asserted in the DPC.

28. The Plan describes the Student’s behavior issues as including Petitioner receiving “an increasing number of calls from [Attending School] regarding the student’s behaviors, including requests to remove him from school (even without him being suspended). The parent was even asked to attend school with the student on a daily basis due to the behaviors that [he] had been exhibiting, especially during the 14-15 school year.” P-1-2 and -2.

29. However, Petitioner testified that she received only four calls from Attending School during SY 2014-2015, and that the callers asked her to come to the school to talk to the Student, not to remove him. Testimony of Petitioner. ²²

²² In closing argument, Petitioner’s counsel suggested that Petitioner misspoke due to

30. Accordingly, the undersigned finds that the above-quoted language from the Plan is without factual basis in the record.

31. Upon questioning by the undersigned, Senior Educational Advocate testified that if she had known Petitioner had only been called a few times and had not been asked to sit with the Student or to take him out of school, it would have changed her analysis but not her recommendation for the compensatory education remedy. Testimony of Senior Educational Advocate. This testimony demonstrates a lack of connection between the Student's educational deficit and the requested relief.

32. The Plan also proposes reimbursement for the Lindamood-Bell evaluation, without any explanation of how that reimbursement would place the Student in the position he would have occupied but for the denial of FAPE.

33. The Plan proposes "no less than 250 hours of Lindamood-Bell per course in reading, written language and mathematics," *i.e.*, 750 hours of instruction, followed by the same amount if the Student fails to make 1.2 years of growth in those areas. P-1-2.

34. On cross-examination, Senior Educational Advocate could not explain how she derived the "1.2 years" figure, and testified that she should have said "at least one year." Testimony of Senior Educational Advocate.²³

nervousness. The undersigned cannot disregard Petitioner's admissions against interest based upon such an assertion by counsel, which is not evidence. Petitioner's counsel also referred to the "DCPS contact log," *i.e.*, R-3, as documenting numerous calls from Attending School to Petitioner. In fact, during SY 2014-2015, other than the IEP Team meetings, there was only one in-person conversation with Petitioner (R-3-9) and one attempted phone call to Petitioner (R-3-12) regarding the Student's behavior and work habits.

²³ In closing argument, Petitioner's counsel stated that the 1.2 years was the period of harm asserted in the DPC, *i.e.*, March 2014 through June 2015. The undersigned cannot disregard the testimony of Senior Educational Advocate based upon such an assertion by

35. Neither the Plan nor the testimony of Senior Educational Advocate explains how a child of Current Age, particularly with his ADHD, possibly could benefit from so many hours of instruction, why the Student who has a below-average IQ should be expected to make more than normal academic progress, or why the amount of such instruction should be doubled if it is *unsuccessful*.

36. Upon questioning by the undersigned, Senior Educational Advocate admitted that four hours per day (or even two hours per day) of reading instruction after a full school day would be too much for the Student, and that if the Lindamood-Bell program requires a minimum of two hours per day for five days per week, it is inappropriate for the Student. Testimony of Senior Educational Advocate.

37. Senior Educational Advocate then testified that the Student could benefit from other tutoring, with a schedule to be worked out individually based upon the Student's needs and the availability of the provider; however, she needed more information before she could make a specific proposal for such tutoring. *Id.*

38. Similarly, IEP Coordinator testified that she thought the Student would progress more quickly with tutoring before or after school. Testimony of IEP Coordinator. She opined that a child with ADHD could tolerate an hour of tutoring after school if the transition were quick; however, IEP Coordinator was not offered or admitted as an expert witness and she does not know the Student or his tolerance level. *Id.* Accordingly, her testimony that the Student could benefit from after-school tutoring is speculative.

counsel, which is not evidence. Moreover, matching a compensatory education remedy to the period of harm constitutes just the sort of "an hour for an hour" approach that the courts have rejected.

39. When, as in the instant case, Petitioner's request for compensatory education is "untethered" to the student's "educational deficit or to the necessary and reasonable education reasonably calculated to elevate [the student] to the approximate position he would have enjoyed had he not suffered the denial of FAPE," the hearing officer cannot award compensatory education. *Gill*.

40. In the instant case, at the PHC and in the PHO, the undersigned advised Petitioner of the need to introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from the Student's alleged loss of FAPE and the specific compensatory measures needed to best correct those deficits, *i.e.*, to elevate the Student to the approximate position the Student would have enjoyed had the Student not suffered the alleged denial of FAPE.

41. The PHO included a bold-font warning to Petitioner that evidence of hours of specialized instruction and/or related services that the Student did not receive that Petitioner asserts the Student should have received does *not* constitute an educational deficit. The PHO advised Petitioner that she must show what the Student did not learn that the Student would have learned if the Student had received a FAPE.

42. However, the record remains devoid of evidence that would allow the undersigned to craft an order of compensatory education that would be "specifically and individually tailored to the student to compensate the student for the educational lapse suffered in violation of the IDEIA." *Gill*.

43. To the contrary, based upon the entire record including the Student's IQ and his ADHD, the undersigned finds that the Student is incapable at the present time of benefiting from instruction exceeding a full school day, such as instruction provided by

Lindamood-Bell or private tutoring. Accordingly, no compensatory education award should be granted in this proceeding because the Student would not benefit from compensatory education at this time. *Id.*

44. Finally, it is the judgment of the undersigned that a separate special education school not only will provide the Student a FAPE prospectively; such a placement will provide the Student as much academic support as he is capable of receiving, thereby remediating to the extent possible the harm caused by three months of denial of FAPE.

XI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. No later than August 19, 2015 Respondent shall convene a meeting of the Student's Individualized Education Program ("IEP") Team, or as many members of that Team as are available, to review and revise Student's IEP to provide that his placement shall be a separate special education day school, meaning that he shall not have contact with any non-disabled peers at any time during the school day. A special education program in which the Student is segregated throughout the school day from non-disabled peers shall be deemed a separate special education day school for purposes of this paragraph even if that program shares a building with a general education program.

2. No later than August 19, 2015 Respondent shall issue a Prior Written Notice ("PWN") or other document to Petitioner identifying the Student's Location of Services ("LOS"), *i.e.*, the school where the Student's IEP will be implemented. If Respondent

fails to issue the PWN by August 19, 2015, the Student's LOS for all of School Year 2015-2016 shall be Private School.

3. Petitioner shall not have any right to reject the LOS selected by Respondent. However, if Petitioner believes that the LOS is incapable of implementing the Student's IEP (as amended pursuant to Paragraph 1), nothing in this Order precludes Petitioner from filing a new Due Process Complaint challenging the LOS.

4. Respondent shall provide the Student transportation services unless Petitioner waives such services.

5. Unless Petitioner waives transportation services, if such services are not provided as of the first day of the 2015-2016 school year at the Student's LOS, Respondent shall reimburse Petitioner the cost of transporting the Student to and from the LOS until transportation services begin, as follows:

(a) If Petitioner or another adult drives the Student by personal vehicle, Petitioner shall be entitled to reimbursement of fifty seven and one half cents (\$0.575) per mile for two round trips per school day between Petitioner's residence or place of employment and the LOS.

(b) If the Student is transported via taxi with Petitioner accompanying him, Petitioner shall be entitled to reimbursement of the actual taxi cost from Petitioner's residence to the LOS and then to Petitioner's residence or place of employment, and the actual taxi cost from Petitioner's residence or place of employment to the LOS and then to Petitioner's residence.

(c) If the Student is transported via taxi with an adult other than Petitioner accompanying him, Petitioner shall be entitled to reimbursement of the actual taxi

cost from Petitioner's residence to the LOS and then to the other adult escort's residence or place of employment, and the actual taxi cost from the other adult escort's residence or place of employment to the LOS and then to Petitioner's residence.

(d) As used herein, "taxi" includes commercial ride-sharing services.

(e) As used herein, "taxi cost" includes any tip actually paid to the driver not to exceed ten percent (10%) of the fare.

(f) Petitioner must obtain receipts for all taxi costs to be reimbursed.

(g) Once transportation services begin, Petitioner shall submit to the representative of Respondent that signed the PWN or other document described in Paragraph 2 of this Order, or to such other representative of Respondent as Respondent may have designated in writing when issuing that PWN or other document, the following:

(i) receipts for all taxi costs with pen and ink notations of any dates and tips that are not printed on the receipt;

(ii) a statement signed by Petitioner stating the total reimbursement sought for taxis; and

(iii) a statement signed by Petitioner itemizing the personal vehicle miles driven on each date, the total number of personal vehicle miles for all dates, and the total personal vehicle reimbursement sought based upon fifty-seven and one half cents (\$0.575) per mile.

(h) Respondent shall reimburse Petitioner within 30 calendar days of receiving the documents described in subparagraph (g) above.

6. Between September 28 and October 9, 2015, Respondent shall convene a meeting of the Student's IEP Team at the Student's LOS to review the Student's academic performance, attendance and behavior since the beginning of the 2015-2016 school year, the June 2015 Lindamood-Bell Testing Summary and Recommendations, and any other evaluations and/or information provided by Petitioner concerning the Student's disability(ies) and needs. The Team shall consider whether the Student's IEP should be amended and shall give particular attention to whether the method(s) of reading instruction since the beginning of the school year have been effective for the Student. The Team shall amend the Student's IEP, if and as appropriate. Nothing in this Order precludes Petitioner from filing a new Due Process Complaint challenging any IEP amendments made, or not made, at or as a result of this meeting.

7. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

8. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

9. Petitioner's other requests for relief are DENIED.

Dated this fifth day of August, 2015.



Charles Carron
Impartial Hearing Officer

Copies to: Petitioner's Counsel Alana M. Hecht, Esq.
Respondent's Counsel Tanya Joan Chor, Esq.
Office of Dispute Resolution
Chief Hearing Officer Virginia Dietrich, Esq.
OSSE Division of Specialized Education
Contact.Resolution@dc.gov

XII. NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).