

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
June 03, 2013

PETITIONERS,
on behalf of STUDENT,¹

Date Issued: May 30, 2013

Petitioners,

Hearing Officer: Peter B. Vaden

v.

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: May 6, 7 and 10, 2013

Respondent.

Student Hearing Office, Rooms 2009, 2001
and 2003
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the “Petitioners” or “Parents”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“DCMR”). In their Due Process Complaint, the Parents allege that DCPS’ July 24, 2012 and October 19, 2012 Individualized Education Programs (“IEPs”) denied Student a free appropriate public education (“FAPE”).

Student, an AGE boy is a resident of the District of Columbia. Petitioners’ Due Process Complaint, filed on April 8, 2013, named DCPS as respondent. The undersigned Hearing

¹ Personal identification information is provided in Appendix A.

Officer was appointed on April 9, 2013. The 45-day deadline for issuance of this Hearing Officer Determination began on April 22, 2013, when the parties jointly agreed to waive the resolution process and proceed to a due process hearing. On April 19, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

On April 18, 2013, Petitioner filed a motion to schedule this matter as an expedited case. The motion was denied at the prehearing conference when the parties agreed to waive the resolution session and to schedule an early due process hearing.

On April 22, 2013, DCPS filed a motion to consolidate this case with Case No: concerning the same student. Counsel for Petitioners objected to consolidating the cases and I denied DCPS' motion.

The due process hearing was held before the undersigned Impartial Hearing Officer on May 6, 7 and 10, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. MOTHER appeared in person, and was represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by PROJECT MANAGER and DCPS COUNSEL and CO-COUNSEL.

At the beginning of the due process hearing, DCPS made an oral motion to strike Petitioners' claims concerning Student's alleged inappropriate placement at FLORIDA SCHOOL. The motion was overruled.

The Petitioners called as witnesses, BEHAVIOR THERAPIST. TUTOR, OCCUPATIONAL THERAPIST, READING CENTER DIRECTOR, DIRECTOR OF ADMISSIONS, Mother and EDUCATIONAL CONSULTANT. DCPS called, as witnesses, Project Manager, OSSE PLACEMENT COORDINATOR, COMPLIANCE CASE MANAGER,

SOCIAL WORKER, and PROGRAM MANAGER. Petitioners' Exhibits, P-1 through P-148 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-53 were admitted into evidence without objection. Counsel for both parties made opening and closing statements. At the request of Petitioners, the parties were granted leave to file post-hearing memoranda by May 15, 2013. Only Petitioners filed a post-hearing memorandum.

On May 5, 2013, Petitioners filed a motion to establish Student's current educational placement during the pendency of this case. DCPS opposed Petitioners' motion. On May 10, 2013, this Hearing Officer issued an order that DCPS fund, as stay-put services for Student, 1:1 home instruction for two hours per day, five days a week, pending an administrative determination of the due process complaint in this case.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

– Whether the IEPs DCPS developed for Student on July 24, 2012 and October 19, 2012 deny Student a free appropriate public education, because (a) the present levels of academic and functional performance are inaccurate and do not fully describe Student; (b) the IEPs do not contain appropriate goals and objectives; (c) the IEPs lack appropriate supplemental aids, services and accommodations (particularly with respect to class size, academic schedule, unilateral hearing loss and diet); (d) the IEPs omit extended school year services; (e) the IEPs omit compensatory education services; and (f) the October 19, 2012 IEP does not identify Student's requirement for a therapeutic residential placement;

– Whether DCPS violated the Parents' IDEA rights. and denied Student a free appropriate public education, by limiting the participation of Student's current service providers in IEP meetings and by failing to arrange for the participation of required IEP team members without cost to the Parents;

– Whether DCPS has violated the Parents' IDEA right of access to Student's educational records by withholding documents about Student that were

collected, maintained or used by DCPS, such as correspondence, emails and shared notes;

– Whether DCPS has violated the Parents' IDEA right to challenge the accuracy of records collected, maintained or used for Student by ignoring their requests to amend his records and by failing to follow IDEA-mandated procedures for responding to Parents' challenge;

– Whether DCPS violated the Parents' IDEA rights by placing Student at the nonpublic school, Florida School, without first affording the Parents an IEP meeting to learn about Florida School and by later impeding the Parents' efforts to acquire needed information; and

– Whether Florida School is unable to offer Student a free appropriate public education, or if Florida School could offer Student a free appropriate public education, whether DCPS' policies and practices would prevent Student from receiving FAPE there.

For relief, Petitioners request an Order for DCPS to reconvene Student's IEP team, in compliance with the IDEA IEP requirements, to rewrite the October 19, 2012 IEP to properly reflect Student's academic, social, emotional and behavioral needs; to include appropriate goals, objectives, services, aids, accommodations, compensatory education and extended school year services; and to specify an appropriate location in which this IEP can be implemented, and, if required, an interim placement for Student; an Order for DCPS to follow IDEA-mandated procedures in identifying Student's next educational placement; an Order for DCPS to place Student at PRIVATE SCHOOL upon his successful completion of the required behavior management program; an Order for DCPS to provide Parents access to all of Student's educational records. In addition, the Parents seek an award of compensatory education.

PRIOR HEARING OFFICER DETERMINATION

In Case No. 2012-0020, these parties appeared before Impartial Hearing Officer Michael Lazan on Petitioners' claims that DCPS had denied this Student a FAPE by failing to provide an

IEP from August 2011 through October 11, 2011 and that DCPS' proposed October 11, 2011 IEP was inappropriate for Student. Following a three-day hearing in February 2012, Hearing Officer Lazan found in his March 9, 2012 Hearing Officer Determination (the "2012 HOD"), that DCPS had denied Student a FAPE from August 2011 through the 2011-2012 school year. Hearing Officer Lazan ordered, *inter alia*, that DCPS convene Student's IEP team to conduct new assessments of Student and to create a new educational program for him. On the first day of the due process hearing in the present case, the parties stipulated that I may adopt relevant findings of fact from the March 9, 2012 HOD as findings of fact in this case.

FINDINGS OF FACT

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

1. Student, an AGE boy, resides with Parents in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education and related services under the Primary Disability Classification, Multiple Disabilities. Exhibit R-3.
3. Student was educated on a home program from October 21, 2009 through August 29, 2011. 2012 HOD, Findings of Fact ¶ 10.
4. Student was enrolled for a short time, from August 29, 2011 to October 11, 2011 at Private School 1. On September 21, 2011, Private School 1 informed DCPS that it was not an appropriate placement for Student. 2012 HOD, Findings of Fact ¶¶ 12, 13.
5. Since September 2011, Student has received some home instruction by a private tutor and received occupational therapy services at OT CENTER. Testimony of Mother. From December 2012 to March 2013, Student received 1:1 instruction at Reading Center. Testimony

of Reading Center Director. Mother attends all of Student's education sessions. Because of Student's behavioral issues, Mother does not believe Student would be able to continue if she were not there. Testimony of Mother.

6. A Neuropsychological Evaluation of Student dated June 28, 2005 reported significant weaknesses in attentional functioning skills, emotional control, working memory, cognitive and self-inhibitory control. This was deemed consistent with Attention Deficit Hyperactivity Disorder, Predominantly Combined Type. 2012 HOD, Findings of Fact ¶ 2.

7. In July 2008, the Student was evaluated by a physician at MARYLAND FACILITY. This physician stated that Student has severe difficulties with motor control and cognitive control, and is very sensitive to praise and reinforcement. She stated that the Student has the extreme regulatory form of ADHD, commonly called full hyperactive-impulse variety. He also has Motor Coordination Disorder. She indicated that the Student needs an environment that is positively oriented, the total opposite of the "zero tolerance" approach. She indicated that the Student is quite unusual in the severity of his issues. 2012 HOD, Findings of Fact ¶ 4.

8. In August, 2008 and September, 2008, the Student was evaluated by two neuropsychologists. These professionals diagnosed the Student with ADHD-Combined Type; Developmental Coordination Disorder; Learning Disorders in Reading, Writing, Math; Anxiety Disorder with Obsessive Compulsive Features; Stereotyped Movement Disorder; and Social Learning Disorder. They recommended continued placement in a full-time special education environment within the context of a "nurturing and highly supportive" school community, with related services of speech and language therapy, occupational therapy and psychotherapy. 2012 HOD, Findings of Fact ¶ 5.

9. On September 15, 2009, a psychiatrist, wrote a one page statement regarding the

Student and determined that he had a significant sensory integration problem and recommended home-based instruction by credentialed special education teachers who are “skilled in managing complex issues.” 2012 HOD, Findings of Fact ¶ 8.

10. On October 1, 2009, the Student received a neurological consultation, which indicated that Student has the emergence of tics and obsessive-compulsive symptomology superimposed on ADHD symptoms. There is reference to Tourette’s Syndrome. 2012 HOD, Findings of Fact ¶ 9.

11. A psychological evaluation, dated October 27, 2010, found that the Student’s reading skills, writing skills and mathematics skills on the Woodcock-Johnson III fell consistently within the low to very low range. On the WISC-IV, the Student tested at the average range for verbal comprehension, but extremely low for working memory and processing speed. Full Scale IQ was tested at 63. On the Vineland Adaptive Behavior Scales, the Student’s scores were adequate in terms of receptive and expressive communication, but moderately low to low in all other domains. 2012 HOD, Findings of Fact ¶ 11.

12. On October 6-10, 2011, a Ph.D. psychologist evaluated the Student. The Student tested with a great deal of “scatter” on the WISC-IV, with standard score of 110 in terms of verbal comprehension and a standard score of 65 in terms of processing speed. Full Scale IQ score was deemed to be 78. This psychologist indicated that the Student should not be placed in an educational setting. She indicated that his clinical picture is very complex, and that there is a need for a clear assessment of his multiple diagnoses. 2012 HOD, Findings of Fact ¶ 28.

13. On October 10, 2011, another psychiatrist conducted a “consultation” with the Student. She indicated it was hard to “disentangle” the Student’s developmental problems and his behavioral/executive problems. She indicated that proper educational placement with a

highly individualized plan would be her first priority. She indicated that “it is possible” that a residential treatment setting will be most appropriate for socialization skills. 2012 HOD, Findings of Fact ¶ 29.

14. In Case No. 2012-0020, Impartial Hearing Officer Michael Lazan found that DCPS had denied Student a FAPE from August 2011 through the 2011-2012 school year, because from August 2011 through October 11, 2011, DCPS failed to provide Student an IEP or an appropriate educational setting, because Student’s October 11, 2011 IEP team did not rely on sufficient evaluative data, because DCPS’ proposed educational setting did not offer adequate behavioral supports, and because the Present Levels of Performance in Student’s October 11, 2011 IEP were incomplete and did not reflect Student’s abilities. Hearing Officer Lazan denied Petitioners’ request to order DCPS to fund Student’s placement at

because the hearing officer found that this proposed placement was not appropriate. In the 2012 HOD, Hearing Officer Lazan ordered, *inter alia*, that DCPS convene Student’s IEP team to conduct new assessments of Student and to create a new educational program for him. 2012 HOD (Exhibit P-12).

15. Petitioners appealed Hearing Officer Lazan’s decision to the U.S. District Court for the District of Columbia, contending that in the 2012 HOD, they have not received their full rights due to (a) DCPS’ failure to comply with portions of the administrative decision; (b) Hearing Officer Lazan’s erroneous denial of certain claims Student and his parents raised in due process and the effect of that denial upon DCPS’ subsequent actions; (c) the inability of DCPS and the D.C. Department of Mental Health to coordinate their efforts on Student’s behalf, such that he cannot avail himself of needed services; (d) the impact of local law, which inhibits effective operation of IDEA mandates; and (e) DCPS’ failure to pay Petitioners’ legal fees and

expenses. See Amended Complaint, *B.D., et al. v. District of Columbia*, Civil Action No. 12-000934 (RJL) (D.D.C.). The Petitioners' appeal remains pending before the Court.

Representation of counsel.

16. On March 20, 2012, DCPS convened a meeting of Student's IEP team, which was attended by Mother and Petitioners' counsel. At this meeting, the team agreed, *inter alia*, to conduct in-home observations, and interviews of Student's providers and Parents, to develop an interim Behavior Intervention Plan ("BIP"), and to conduct a psychological observation and review, a comprehensive Occupational Therapy ("OT") evaluation and a comprehensive Speech-Language ("S-L") evaluation. Exhibit R-19.

17. On July 9, 2012, SCHOOL PSYCHOLOGIST issued a psychological review report based upon her review of Student's prior evaluations conducted over an 8 year span, her interviews with Tutor and with Mother, and her observations of Student at OT Center and at the family home during a tutoring session. In her report, School Psychologist provided recommendations for consideration by Student's Multidisciplinary Team ("MDT"), to wit:

- i. The MDT review all current information and reports in order to determine DCPS eligibility criteria for special education services. Student currently is identified as a MD student (OHI/LD) and he clearly continues to qualify for special educations services. However, given his obsessive and maladaptive behaviors, the MDT should discuss their impact on his learning and determine if he also qualifies in other areas of disability.
- ii. All requested evaluations should be reviewed in conjunction with this evaluation before any decisions are made.
- iii. Given that Student has not been in a formal school setting for 2 years, it is recommended that he be provided with a 1:1 aide to help with his transition and in managing his behaviors throughout the school day. It is also recommended that the transition may be limited to a few hours the first few days until he can get acclimated to the new environment and slowly increase the hours until he can tolerate a full school day.
- iv. Given Student's history of hearing loss and sensitivity to sounds such as alarms and bells, his new school should avoid seating him near the intercom system. He should also

be seated away from high traffic areas or distractions. In addition, if possible, if the school knows when the bells will be ringing, to warn him when they are occurring.

v. Student does exhibit several anxious and obsessive behaviors such as sucking on an object and hitting himself. As much as possible, he should be allowed to use these objects but a system could be developed where he can ask for them when he needs them. Emphasis should also be made to redirect his attention back to the lesson instead of focusing on stopping his behaviors. As much as possible, ignoring his acting out and instead focusing on prompting or redirecting his attention is recommended, in addition, using positive praise and positive redirection should be used instead of negative directions.

vi. Student has several interests that he has responded positively to and should be used to reinforce and redirect his behaviors. It is important to note that these rewards and incentives should be immediate and not be used for long-term goals. These interests and rewards include elevators, maps, transportation systems, trucks, computer time, climbing, self check-out lines in the grocery stores, and books about dogs and little boys.

vii. Student requires frequent short breaks and continuous redirection and prompting. Although his attention span is limited, he can be easily redirected and prompted. It is recommended that unless he is extremely frustrated and agitated, any verbal or angry outburst be ignored and rather redirect his attention back to the topic with a question or a calm statement to use appropriate tone or language.

viii. Given that Student's medication wears off by noon, it is recommended that if possible most of his academic work be in the morning. His schedule should also be very structured and with clear expectations and frequent reminder of rules.

ix. Student also struggles with appropriate social skills and interacting appropriately with his peers despite a desire to play with them. Thus, it is recommended that he receive counseling services to address pro-social skills, this may include a social skills group.

Exhibit R-20.

18. On April 25, 2012, DCPS Social Worker interviewed Student and Mother for a confidential social work assessment. In her May 4, 2012 report, based upon her interviews and review of prior evaluations, Social Worker concluded that it appeared that Student was a child with very unique and specialized needs based upon his complicated medical history, the resulting impairments and co-occurring mental health signs and symptoms. Social Worker's only recommendation was that DCPS should convene an MDT team meeting to consider

Student's current evaluation results and the findings of other assessments. Exhibit R-21.

19. On April 24, 2012 and May 3, 2012, DCPS OCCUPATIONAL THERAPIST conducted observations of Student at home and at OT Center. Based upon these observations and her review of prior assessments, DCPS Occupational Therapist reported the impact of Student's disability on his learning and participation:

Student's difficulties processing sensory information are influencing his ability to demonstrate appropriate adaptive responses to sensory input and engage in the typical experiences of a school day (peer interaction, transitions, group engagement, classroom-based instruction). He exhibits a mixed profile of sensory sensitivity, seeking and avoidance behaviors. All sensory systems (auditory, tactile, visual, movement, vestibular, proprioceptive) appear overwhelmed making self-regulation a constant challenge for Student. His profile is compounded by attention and behavioral problems. Students with this presentation require a high level of external support to ensure their availability for learning. Delays in fine motor proficiency and visual perceptual motor skills are particularly manifested in handwriting.

Exhibit R-22.

20. DCPS SPEECH-LANGUAGE PATHOLOGIST ("S/L Pathologist") conducted a comprehensive speech and language reassessment of Student on April 27 and May 1, 2012. In her May 4, 2012 report, S/L Pathologist stated her summary impressions:

Although his medical and education history is complex, Student is a bright student and has an eagerness to learn. Current test results should be interpreted with caution given Student's attention and behavioral challenges during the assessment. Results suggest that in the areas of single word vocabulary knowledge and use, Student's performance is consistent with similar-age peers. In the area of spoken language, as assessed using selected tests of the Comprehensive Assessment of Spoken Language ("CASL"), Student's lexical development on the Antonyms subtest was average, and consistent with the single word vocabulary measures. Student's knowledge and use of a variety of age appropriate grammar/syntax suggest some degree of vulnerability. Results are consistent with previous testing. Student can use context to comprehend some aspects of nonliteral (abstract) language. Although Student could listen to stories and answer questions, his performance was definitely impacted by the length of the story and his wavering attention. In the area of pragmatic judgment, Student continues to struggle with using effective conversation skills (*i.e.* greetings, initiating, maintaining and terminating, providing adequate background information), using effective social cognitive skills (*i.e.* recognizing situational cues, communication expectations, making adjustments to meet communication demands), and comprehending and using multiple nonverbal

communication behaviors (*i.e.* facial cues, body language, tone of voice). Student may require social skills to be explicitly taught via modeling, role-playing and social stories. Student presents with a very mild speech disorder that is characterized by hypernasality impacting and distorting /th/ and some vowel sounds. Although Student's speech is generally intelligible, his mother reported that the sound distortion of the /th/ has begun to impact Student's decoding and encoding skills. Student also exhibits difficulty monitoring his vocal loudness. When considering all of the educational data including the results of this assessment, parent/tutor input, observations and record review, an educational need for speech and language related services is *strongly* suspected.

Exhibit R-24.

21. On the recommendation of S/L Pathologist, Student was referred for an audiological evaluation. DCPS AUDIOLOGIST reported in a July 30, 2012 evaluation summary that test results concluded normal hearing acuity in the left ear with a possible slight conductive component. Slight to moderate conductive hearing loss in Student's right ear was suggested. Exhibit R-25.

22. On May 14, 2012, Compliance Case Manager wrote Mother, by email, to inform her that DCPS had completed its evaluations (speech language, occupational therapy, psychological observation, and social work assessment) of Student and that pursuant to the 2012 HOD, a meeting needed to be held to review the evaluations. Exhibit P-22. An MDT/IEP meeting was convened on May 18, 2012. Mother and Petitioners' counsel attended. The parties agreed to continue the meeting, which was rescheduled for June 8, 2012. Exhibits P-29, P-31.

23. At the June 8, 2012 MDT/IEP team meeting, Student was found eligible for special education and related services under the Multiple Disabilities ("MD") classification, associated with ED and OHI. Student did not meet the criteria for Autism Spectrum Disorder classification. Exhibits P-37, P-38. The team removed Student's prior Specific Learning Disability classification. Mother disagreed with that decision. Exhibit P-39.

24. On June 28, 2012, Petitioners' Counsel forwarded to Compliance Case Manager a

Developmental Cognitive Neurology Evaluation report by DEVELOPMENTAL

NEUROLOGIST, who evaluated Student on April 3, 2012. Developmental Neurologist

concluded:

Student has a very serious situation at the present time, having many signs of a rather profound set of neurological impairments, which really leave only a few strong domains of functioning like, if you will, “a bit of blue sky poking out from behind a lot of clouds.” There are also emotional complications, but we have to consider this neurodevelopmental and motor situation, especially if one looked at him trying to copy designs and take into account that he did extremely poorly. I can only echo . . . how many different aspects of cognitive functioning are impaired, many of which can be traced back to a very severe level of lack of executive functions (meaning both “hot” and “cold” cognitive control and emotional control). . . . Thus over the course of this academic year 2011-2012 there certainly has not been any improvement in his status, which is to be expected due to the fact that he really does not have a very good educational/experiential situation. . . .

My recommendation is . . . there needs to be an interim step or intermediate step of going from the present “place-holding” situation into a residential treatment center that would get everything straightened out in terms of neuropsychiatric treatment program including medication and then transition Student to an educational setting, probably residential at this stage in his life. . . . [Student’s] recent experience at [private special education day school] shows that placing him in the wrong place, and without a program tailored to his unique needs, will not merely have the unfortunate effect of delaying his progress, but will actually cause him to regress, forcing him to then spend many months “unlearning” the harmful behaviors prompted by the bad experiences. Another problematic experience could cause a psychotic episode that would create permanent damage that will forever impede successful life and educational opportunities for him. Thus, we are not dealing with a situation in which we can learn from a failure and use the information obtained to craft a better program for Student. We must act only on all the needed information and only with great confidence that whatever is done next will not hurt him. Student’s medical, clinical psychological, social and educational needs are thus intertwined and one cannot address one need without taking all others into account. I am very much concerned that we achieve a residential treatment center placement, which is the first step toward understanding the total needs of this highly complex child who, despite his difficulties, has enormous potential.

Exhibit P-45.

25. In a July 5, 2012 Occupational Therapy Evaluation and Progress Report, Occupational Therapist, who had worked with Student for almost 3 years, reported that although Student had made considerable progress in some areas of therapy, he continued to demonstrate

decreased occupational performance and independence in key areas that impact his ability to function to his fullest potential. She recommended continued individualized occupational therapy provided by herself. Exhibit P-48.

26. Student's IEP team convened on July 12 (approximately 2½ hours), July 18 (approximately 3 hours), and July 24, 2012 (approximately 3½ hours) to draft an IEP for Student and review a Functional Behavioral Assessment ("FBA"). Mother and Petitioners' Counsel attended the meeting. Exhibits P-51, P-52 and P-54. The IEP (the "July 24, 2012 IEP") was finalized and a copy was provided to Mother. Exhibit R-14.

27. Tutor attended the July 12, 2012 and subsequent IEP meetings when the July 24, 2012 IEP and the October 19, 2012 IEPs were developed. Occupational Therapist also attended portions of these meetings. Exhibits P-51, P-52, P-54, P-70. DCPS provided only limited compensation to these providers for their IEP meeting attendance. *See, e.g.,* Exhibit P-117.

28. The July 2012 IEP team considered Student's assessment data, including 2010 educational achievement testing, 2012 raw evaluation data from Reading Center, an October 2011 psychological evaluation, an April 2012 developmental cognitive neurology evaluation, and a September 2011 performance summary from PRIVATE SCHOOL B, as well as input from Mother, Tutor, and Occupational Therapist. Exhibits R-2, P-51, P-52, P-54.

29. Both the July 24, 2012 IEP and the October 19, 2012 Amended IEP specify that Student should be provided the following "Other Classroom Aids and Services" in order to access the curriculum:

Specific Behavior plan/ multiple methods of behavioral analysis and support, sensory tools and diet (consider slant board, therapy ball, air seat, etc.); fidget toy or other object to provide sensory input; reducing amount of words per page/ sentence windows, dictate responses, and read aloud for classroom work and classroom-based assessments, availability of a quiet space, amplification and/or preferred seating, supported transitions, access to word processor/computer. Core classes should be provided in the morning to

the extent possible due to medication management and the wearing effects as the day progresses. Related services and electives should be provided in the afternoon to the extent possible. Dedicated aides should receive training in consultation with the parent and the MDT. Student should have access to a visual schedule that is reviewed regularly with trusted staff.

The October 19, 2012 Revised IEP added, to this list, “captioning where appropriate.” Exhibits R-2, R-3.

30. At the July 24, 2012 IEP meeting, the IEP team had an extended discussion about Student’s academic goals. Mother and the Parents’ attorney objected to setting GRADE standards as annual goals for Student. The DCPS representatives explained that because Student is identified for Grade, DCPS must use differentiated instruction to help Student access the general education core for that grade. They stated that DCPS would provide Student modified Grade level curriculum appropriate to his current level. Exhibit P-54.

31. The July 24, 2012 IEP provided that Student would be provided 26.5 hours per week of Specialized Instruction, 60 minutes per week of Speech-Language Pathology, 90 minute per week of Occupational Therapy, and 120 minutes per week of Behavioral Support Services, all in an Outside General Education setting. In addition, the IEP provided for 4 hours per month of Parent Counseling and Training, the support for Student of a dedicated aide and school bus transportation. Exhibit P-55.

32. DCPS’ proposed placement was a non-public separate day school. DCPS undertook to send Student’s IEP to the D.C. Office of the State Superintendent of Education (“OSSE”) to make referrals to programs that would be able to implement the IEP. DCPS also authorized 20 hours of independent S/L services and 40 hours of independent counseling as interim services for Student. Exhibits R-14, P-55.

33. On July 31, 2012, Petitioners’ Counsel sent Compliance Case Manager comments on the July 24, 2012 IEP. Exhibit P-56.

34. On August 6, 2012, DCPS forwarded a request to OSSE for a location assignment review. In its request to OSSE, DCPS informed OSSE that Student's IEP team had crafted an educational program that recommended a full-time separate setting in a structured/predictable, quiet environment that is small and minimizes negative stimuli. Attached to the request were the July 24, 2012 IEP, the July 2012 BIP, the 2012 IEP Addenda and background evaluation and assessments, including the assessments conducted pursuant to the 2012 HOD. Exhibit R-29.

35. By letter of August 15, 2012, Petitioners' Counsel wrote Placement Coordinator to express concerns over the process of OSSE's identifying a location of services for Student. Petitioners' Counsel objected to, *inter alia*, OSSE's referring Student to an identified school, without DCPS' first convening an IEP team meeting, at which the Parents participated and provided input. Exhibit P-60.

36. OSSE sent referral packets for Student to 6 private day schools. Three of the schools declined to consider Student. Of the remaining three schools, one school did not accept Student because he was not autistic. Mother and Student visited a second school, in the Virginia suburbs, which declined to accept Student. Mother and Student visited a third school, in Maryland, which also did not accept him because of behavior issues. By late September or early October 2012, DCPS concluded that a day school placement for Student would not be possible. Testimony of Mother.

37. On September 19, 2012, Petitioners' Counsel wrote Project Manager and OSSE Placement Coordinator, by email, to request an IEP meeting to address updating Student's IEP with information obtained from an independent OT evaluation, the audiological assessment and LICENSED PSYCHOLOGIST'S clinical observation; revisiting portions of the IEP that were not sufficiently explicit about Student's educational needs; reconsidering the appropriateness of a day program for Student and instead discussing placement at a residential treatment center; and

discussing ongoing interim services for Student. Exhibit P-65.

38. An IEP meeting for Student was convened on October 5, 2012 for approximately 2½ hours. Mother and Petitioners' Counsel attended. At this meeting, Student's IEP team agreed that because the LEA was unable to identify a non-public day school that was able to implement Student's IEP, the IEP team would recommend that Student be placed in a more restrictive environment. Exhibit P-70.

39. Student's revised IEP (the "October 19, 2012 IEP") was amended to change Present Levels of Performance and Annual Goals for OT and provided that Student would receive the same special education and related services and consultation services specified in the July 24, 2012 IEP. The October 19, 2012 IEP added Assistive Technology services (Sound field amplification system) for hearing. Exhibit R-3.

40. On or about October 19, 2012, DCPS provided the IEP revision for Student to Petitioners' Counsel. By email of October 30, 2012, counsel provided Project Manager requested changes and additions to the revised IEP, including, *inter alia*, concern that the IEP did not reflect residential placement, the IEP did not address Student's dietary needs and the IEP did not reflect the results of Student's audiological assessment. Exhibit P-85. By email of November 1, 2012, Project Manager requested DCPS to attach the October 30, 2012 email from Petitioners' Counsel as an addendum to the October 19, 2012 IEP.

41. In an October 31, 2012, Prior Written Notice, DCPS provided notice to the Parents that Student's July 24, 2012 IEP was amended to include revised OT goals, Assistive Technology for audiology, and to identify placement in a more restrictive setting. The PWN states that the reason for the placement change for Student to receive FAPE in a residential setting was because OSSE had been unable to identify a day program appropriate to meeting Student's needs. Exhibit R-6.

42. Mother and Petitioners' Counsel repeatedly requested copies of Student's educational records and other documents concerning Student in DCPS' custody. For example, on February 27, 2013, Mother sent Project Manager an email stating,

I would like all of [Student's] educational records, which includes all written exchanges about him among DCPS employees, between DCPS and other agencies (such as OSSE or [Department of Mental Health]) and between DCPS or OSSE and outside entities (such as schools). I can't say what you "specifically" require because I do not know what you have generated; however, it is obvious from what I've seen and have been told that there are many emails, letters, and similar documents about [Student] in DCPS' and OSSE' possession that I have never seen, such as:

1. Your instructions to the various evaluators
2. Emails that I have watched you send & receive while at IEP meetings
3. Internal emails regarding IEP meetings. scheduling, funding issues, etc.
4. OSSE's referrals to various schools and the responses it received
5. The various communications with [Massachusetts School 2] about the referral, our visit, and so forth.

Exhibit P-107.

43. On October 11, 2012, OSSE Placement Coordinator identified to Mother six residential locations that OSSE was then considering for Student, including Massachusetts School 1, Massachusetts School 2, Virginia School 1, Florida School, Georgia School and Virginia School 2. Exhibit P-73. On October 11, 2012, Placement Coordinator also informed Mother that Florida School had determined that Student would be appropriate for placement on their Children's Unit and currently had a bed available. Exhibit P-74. On October 12, 2012, Massachusetts School 2 issued a conditional letter of acceptance for Student. Exhibit P-77. On October 18, 2012, Massachusetts School 1 determined that Student was an appropriate candidate for its intensive program. Exhibit P-79.

44. When OSSE issues a location assignment for a placement outside of the District of Columbia, it is required to obtain the parent's signature on an Interstate Compact on the Placement of Children ("ICPC") form. Mother would not sign the ICPC consent for any of the

residential schools identified for Student. Testimony of Placement Coordinator.

45. Mother met in person with the staff at Massachusetts School 2. She expressed concerns about the number of students in the classroom, the number of students in the dorm, ambient noise levels, and unpredictable behaviors of boys served in the Massachusetts School 2 Program. In a letter dated November 6, 2012, the private school's Executive Director responded to Mother, that there were certain things over which it was impossible to exercise a high degree of control, including assuring that none of the students would speak loudly, shout or say and do inappropriate things; disconnecting alarms at the dorms; predicting or preventing other loud noises, including fire alarms, flushing toilets or the sound of paper tearing. The Executive Director concluded that while the school could guarantee quality services, whether or not those services would prove effective for Student could not be foreseen. Exhibit P-87. Mother responded with an email dated November 8, 2012 requesting more information. Exhibit P-88.

46. In an email dated November 8, 2012, Project Manager wrote Mother to inquire whether she was rejecting the proposed placement of Student at Massachusetts School 1 and requesting that she complete the required ICPC paperwork. He wrote, "If you are rejecting this FAPE for [Student], please advise LEA of your intention to withdraw from DCPS and enroll in another LEA." Mother responded by email dated that November 13, 2012 that since Massachusetts School 1 and DCPS had refused to address her concerns, she had filed for due process to challenge the October 19, 2012 IEP and Student's placement at Massachusetts School 1. Exhibit P-89.

47. By email of November 16, 2012, OSSE Placement Coordinator notified Massachusetts School 1 that OSSE rescinded the location assignment for Student at that private school because the time period for Student's acceptance had expired. Exhibit P-90.

48. By email of November 16, 2012, OSSE Placement Coordinator notified Mother

that OSSE would grant “the request for a change in Location Assignment” to Massachusetts School 2. Exhibit P-91. By email of November 18, 2012, Petitioners’ Counsel objected to the placement of Student at Massachusetts School 2 as premature. Specifically, counsel demanded an IEP meeting to consider the assignment and requested an opportunity for Student and Mother to visit the school. Exhibit P-93.

49. On November 20, 2012, DCPS issued a Letter of Invitation for an IEP meeting on December 3, 2012 to discuss Student’s placement/location of services. Mother responded that neither she nor Student’s service providers were available that day. Exhibit P-95. Student’s IEP team eventually reconvened on December 13, 2012 for approximately 1½ hours. Mother and Petitioners’ counsel participated. At that meeting, the IEP team members discussed Student’s residential placement as well as interim services. No resolution on residential placement was reached at the meeting. Exhibit P-100.

50. In December 2012, DCPS authorized Parents to obtain publically-funded instruction for Student at Reading Center for up to 180 hours, to be completed by March 1, 2013. Exhibit P-103. Student began attending the Reading Center program in late December 2012 and continued until mid- or late- March 2013. At Reading Center, Student typically attended from 9:00 a.m. to 12:00 p.m. He was taught 1:1 in a separate classroom from other students. After several weeks, Mother also attended the sessions. Mother was able to help monitor and regulate Student’s behaviors and provide needed sensory breaks for him. Testimony of Reading Center Director.

51. After Massachusetts School 2 conditionally accepted Student, the only opening at the school was taken by another student. In the winter of 2013, there was a new opening at the school. On March 4, 2013, Mother and Student traveled to Massachusetts at DCPS expense to visit the school. Exhibit P-106. After an interview and tour of the campus, the school staff

determined that Massachusetts School 2 was not appropriate for Student because of concerns about Student's not being able to handle a full-day program, his impulsivity and his ability to function within their program. The staff felt that Student needed a higher level of care and supervision than Massachusetts School 2 could provide. Testimony of Director of Admissions.

52. Prior to the visit to Massachusetts School 2, on February 27, 2013, OSSE Placement Coordinator informed Mother that OSSE was changing Student's Location Assignment to Florida School. Exhibit P-110. Florida School has received other students from the District of Columbia with presentations similar to Student's. Placement Coordinator opined that Florida School is one of the best programs which would be able to implement Student's IEP. Testimony of Placement Coordinator. Florida School is a highly recommended facility. The school works really well with parents and with DCPS. The staff there is very assessable. The school has a physician on staff. Students at Florida School receive an IEP and mental health services. Florida School is very good with children who have transition problems and who have not been attending school. Testimony of Program Manager.

53. A Letter of Invitation was issued for an IEP meeting on March 15, 2013 to discuss the Florida School residential placement. Exhibit P-112. By letter of March 7, 2013, Petitioners' Counsel wrote Placement Coordinator that Parents neither accepted nor rejected the Florida School assignment for Student pending, *inter alia*, the convening of another IEP meeting to revise Student's IEP and to hear at the meeting from representatives of the Florida School. Exhibit P-114.

54. In fall 2012, before Student had been referred by OSSE to Florida School, Mother spoke with Florida School staff about their program. The Florida School staff answered many of Mother's questions regarding their program at that time. Exhibit P-127.

55. Student's IEP team reconvened on March 15, 2013 for approximately 1½ hours.

Mother and Petitioners' counsel attended the meeting. Several representatives from Florida School attended the meeting by telephone. The Florida School staff responded to queries from Mother and her representatives about the school, its program, school staff and why the program would be suitable for Student. At the end of the IEP meeting, Petitioners' Counsel stated that Mother had a lot more questions. Florida School staff agreed that the school would respond to Mother's additional questions if she would provide them in writing. Exhibit P-118.

56. By email of March 19, 2013, Petitioners' Counsel sent Florida School what counsel described as a "very long list of questions" – 81 questions, 8 single-spaced pages. Exhibits P-122, P-123. Most of the questions clearly related to Student's educational needs. Other questions were of a more adversarial nature. *E.g.*, Question 62:

We are aware that [Florida School] was named defendant in a recently filed lawsuit by a Brevard County couple who allege that two children were not properly protected while in foster care, resulting in the children being abused. What is [Florida School's] defense in that lawsuit?

57. Following receipt of Mother's list of questions, Florida School proposed convening another conference call meeting, limited to one hour, to address Mother's questions. Petitioners' counsel declined because of scheduling difficulties and because counsel did not think that one hour would suffice to address all of Mother's questions. Exhibit P-126.

58. BEHAVIOR ANALYST from Florida School was scheduled to be in the Washington, D.C. area the first week of April 2013. He offered to meet with Mother and DCPS staff to address Mother's list of questions about Florida School. Mother decided not to meet with Behavior Analyst. Exhibit P-134, Testimony of Mother.

59. On April 29, 2013, Florida School informed DCPS that it was no longer willing to accept Student's referral. In a letter from the private school's Director of Legal and Risk Management, the school explained,

[Student] was initially accepted to our program following a clinical review of the referral information. However, it is our experience that family/primary caregiver support of treatment is an integral component for building the necessary therapeutic relationship to ensure a successful treatment outcome. Although the child is clinically appropriate for our level of care it is clear from our communications with the mother and her attorney that they are not supportive of [Student's] being placed with us. As such [Florida School] is no longer willing to accept this referral.

Exhibit R-55.

60. Following Florida School's withdrawal of its acceptance of Student, no other placement has been identified for Student. DCPS is continuing to work with OSSE to identify another site location that will be able to implement Student's IEP. Testimony of Project Manager.

61. I found all witnesses at the due process hearing, except Educational Consultant, to be credible. For the most part, the findings and conclusions in this decision did not depend upon witness credibility. My concerns with Educational Consultant's credibility are discussed in the Conclusions of Law section of this decision.

CONCLUSIONS OF LAW

Introduction

This case concerns Respondent DCPS' alleged denial of FAPE to Student, a child with "a rather profound set of neurological impairments," since the issuance of the prior Hearing Officer Determination on March 9, 2012. Before the last due process hearing, Student had not attended school since 2009, except for a brief period in the fall of 2011. The 2012 HOD ordered DCPS, *inter alia*, to conduct new assessments of Student and convene the IEP team to create a new educational program for Student based upon the updated data. In the 15 month period since the 2012 HOD was issued, Student's updated assessments have been completed and the IEP team has developed new educational programs, most recently residential-based, for Student.

The ultimate goal in any proceeding under the IDEA is to ensure that the child at the center of it receives the education he or she is due under the law. *LeSesne ex rel. B.F. v. District of Columbia*, 2005 WL 3276205, 7 (D.D.C.2005), *aff'd* 447 F.3d 828, 834 (D.C.Cir.2006).

DCPS' efforts, since the 2012 HOD, to implement school-based programming for Student have not, to-date, been successful. However, aside from claims about the appropriateness of Florida School as a placement for Student, the adequacy of DCPS' efforts to implement Student's IEPs is not at issue in this case. (*See Prehearing Order*, April 25, 2012.) The primary determination to be made by this Hearing Officer is whether the IEPs developed for Student in July and October 2012 were reasonably calculated to provide him educational benefits. Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioners in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex*

rel. Schaffer v. Weast, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

I. Did the July and October 2012 IEPs Offer Fape?

- i. Did the IEPs which DCPS developed for Student in July and October 2012 deny Student a FAPE, because (a) the present levels of academic and functional performance are inaccurate and do not fully describe student; (b) the IEPs do not contain appropriate goals and objectives; (c) the IEPs lack appropriate supplemental aids, services and accommodations (particularly with respect to class size, academic schedule, unilateral hearing loss and diet); (d) the IEPs omit extended school year services; (e) the IEPs omit compensatory education services; and (f) the October 2012 IEP does not identify Student's requirement for a therapeutic residential placement;
- ii. Did DCPS violate the Parents' IDEA rights, and deny Student FAPE, by limiting the participation of Student's current service providers in IEP meetings and by failing to arrange for the participation of required IEP team members without cost to the Parents?

Student's July and October 2012 IEPs were products of several lengthy IEP meetings in which Mother, the Parents' attorneys, Student's academic tutor and other providers played very active roles. Transcripts from the three July IEP team meetings and the October meeting have been admitted into evidence. These meetings, lasting of total of some 12 hours, did not exemplify the cooperative approach envisioned by Congress to produce a consensus between school officials and the parents. *See Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). The Parents' dissatisfaction with the July and October 2012 IEPs is not, at base, a concern over the level of services offered by DCPS to Student – full-time day placement under the July IEP, amended to residential placement in October – but rather over the accuracy and detail of the component parts of the IEPs which underlie the special education and related services offered to Student.

An IEP is the vehicle used by an IEP team to assess a student's needs and assign a commensurate learning environment. *See, e.g., Gill v. District of Columbia*, 751 F.Supp.2d 104,

108 (D.D.C.2010). The IEP team examines the student’s educational history, progress, recent evaluations, and parental concerns prior to implementing a FAPE for the student. *Id.* At a minimum, the IEP and the corresponding FAPE must “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, a hearing officer must determine “[f]irst, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Rowley*, *supra*, 458 U.S. at 206-07.

The IDEA’s Procedural Requirements

A. Members of IEP Team

Petitioners allege that DCPS did not comply with the IDEA’s requirements for the membership of Student’s IEP teams, because the agency effectively restricted the participation of Student’s current service providers, Tutor and Occupational Therapist, in the July and October IEP meetings, by limiting what it would pay these providers for their attendance. Under the IDEA, a Local Education Agency (“LEA”) must ensure that the IEP team includes –

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who—
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

- (ii) Is knowledgeable about the general education curriculum; and
- (iii) Is knowledgeable about the availability of resources of the public agency.

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(7) Whenever appropriate, the child with a disability.

34 CFR § 300.321(a). When the July and October IEP meetings were convened, Student was not attending school. Tutor was his only scheduled teacher. He also received OT services from Occupational Therapist of OT Center. Therefore, the only individuals qualified to fill the special education team member roles for Student's IEP meetings were Tutor and Occupational Therapist. The IDEA required that Student's IEP Team include either his special education teacher or a special education provider, but not both. *See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes*, 71 Fed. Reg. 46675 (August 14, 2006). I find that under Section 300.321(a)(3), the Parents had the right to have Tutor, or, alternatively, Occupational Therapist in attendance as a team member for the entire duration of the IEP meetings. *See Analysis of Comments and Changes, supra* (Inconsistent with section 614(d)(1)(C) of the [IDEA] for an LEA to unilaterally excuse an IEP Team member from attending an IEP Team meeting.) DCPS' refusal to pay for either Tutor or Occupational Therapist to attend all of the IEP meetings was a procedural violation of the IDEA. *See R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 940 (9th Cir. 2007) (District's failure to include a special education teacher or provider on the IEP team who actually taught child was a procedural violation of the IDEA.)

Procedural violations of IDEA do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), *citing C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876, 881 (3d Cir.2005) (per curiam). In the present case, Tutor actually did attend the IEP meetings on July 12, July 18, July 24 and October 5, 2012. Occupational Therapist attended all or part of each meeting as well. Both providers played active roles as IEP team members. I find, therefore, that DCPS' limit on compensating Tutor and Occupational Therapist for being on Student's IEP team did not result in loss of educational opportunity to Student or deprive Parents of their participation rights. Student, therefore, was not denied a FAPE.²

B. Present Levels of Performance

Petitioners next contend that the July and October 2012 IEPs are procedurally deficient because (a) the IEPs' present levels of academic and functional performance sections are inaccurate and do not fully describe student, and (b) the IEPs do not contain appropriate goals and objectives. The IDEA requires the statement of a child's present levels of performance in the IEP to include how the child's disability affects his involvement and progress in the general education curriculum. *See Analysis of Comments and Changes, supra*, 71 Fed. Reg. at 46662. The Present Levels of Performance in the July 24, 2012 IEP were identified by the IEP team based on extensive input from the DCPS representatives, as well as from Mother, Tutor, Occupational Therapist and the Parents' attorneys. The IEP team considered Student's assessment data, including 2010 educational achievement testing, 2012 raw evaluation data from

² Notwithstanding that I have not found that DCPS' failure to fully compensate Tutor resulted in denial of FAPE, I strongly recommend that DCPS pay Tutor for all of her documented time spent attending IEP meetings for Student.

Reading Center, an October 2011 psychological evaluation, an April 2012 developmental cognitive neurology evaluation, and a September 2011 performance summary from Private School B.

At the due process hearing, Parents' expert, Educational Consultant, opined that the Present Levels of Performance in Student' IEPs were not accurate because they were based on anecdotal information and not evaluative data. She also faults the IEP team for not updating the Student's Present Levels from the July to October meetings. I did not find Educational Consultant to be a credible witness. Her testimony that the IEP team did not consider evaluative data is refuted not only by the extensive documentation in the IEPs of the data considered by the IEP team, but also by the recordings of the IEP team's deliberations which were all transcribed. Nor was the IEP team required to rewrite Student's Present Levels of Performance when it revised his IEP in October 2012. The October IEP meeting was convened to amend the July IEP to include revised OT goals, assistive technology for hearing and to change Student's placement to a more restrictive setting. The IDEA expressly allows changes to an IEP to be made at an IEP team meeting, by amending the IEP rather than by redrafting the entire IEP. *See* 34 CFR § 300.324(a)(6). I find that the statements of Student's present levels of performance in the July and October 2012 IEPs met the IDEA's requirement to describe how Student's disability affects his involvement and progress in the general education curriculum.

C. Annual Goals

The IDEA requires that each child's IEP must include annual goals to enable the child to be involved in and make progress in the general education. *See* 34 CFR § 300.320(a)(2). Educational Consultant testified that the July 24, 2012 IEP academic goals were inappropriate for Student because the IEP math goals are based on GRADE level content, which she opined is not achievable. Tutor testified that she does not work with the IEPs' annual goals because they

are far above Student's actual current levels. At the July 24, 2012 IEP meeting, the IEP team had an extended discussion about Student's academic goals. Mother and the Parents' attorney objected to setting Grade standards as annual goals for Student. The DCPS representatives explained that because Student is identified for Grade, DCPS must use differentiated instruction to help Student access the general education core for that grade. However, DCPS would provide Student modified Grade level curriculum appropriate to his current level. DCPS' representatives at the IEP meeting included, *inter alia*, Project Manager, who was qualified as an expert in the development of IEPs, and a special educator. I find that, according due deference to the expertise of DCPS' special education personnel, the IEPs' annual goals for Student are not inappropriate. *See, e.g., Tice By and Through Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207-1208 (4th Cir.1990) (Court should not disturb an IEP simply because we disagree with its content. Rather, we must defer to educators' decisions as long as an IEP provided the child "the basic floor of opportunity that access to special education and related services provides." (quoting, *Rowley, supra* 458 U.S. at 201)); *T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.)

D. Failure to Identify Placement

The final procedural violation alleged by Petitioners is that the October 19, 2012 Amended IEP does not identify Student's requirement for a therapeutic residential placement. If the IEP team had not determined Student's need for residential placement, this omission could be a substantive IDEA violation. However, it is undisputed that at the October 5, 2012 IEP meeting, the IEP team recommended that Student "be placed in a more restrictive environment than a non-public day school." Further, on October 31, 2012, DCPS issued its Prior Written Notice changing Student's placement to a residential setting. Still, the October 19, 2012 IEP's

omission of Student’s residential placement requirement violates the IDEA. An IEP team must specify, at least, the child’s “educational placement,” that is, the general type of educational program in which the child is to be placed. *See, e.g., T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 419-420 (2nd Cir. 2009) (“Educational placement” refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the “bricks and mortar” of the specific school.) *But see, Eley v. District of Columbia*, 2012 WL 3656471, 8 (D.D.C.2012) (The IEP must contain a location where the services will be provided.)

I find that the omission of the IEP team’s placement decision in the October 19, 2012 IEP has not caused a loss of educational opportunity to Student or deprived Parents of their participation rights because DCPS rectified the omission with the October 31, 2012 Prior Written Notice, which notified the Parents that Student would receive FAPE in a residential setting.³ Moreover, the evidence establishes that since the October 5, 2012 IEP meeting, OSSE and DCPS have worked diligently to identify a residential school that is able to implement the revised IEP. Therefore, DCPS’ procedural violation, in failing to specify Student’s requirement for a residential placement in the October 19, 2012 IEP, did not result in a denial of FAPE.

IEP Substantive Content

In addition to the alleged procedural violations considered above, Petitioners also claim that the July and October 2012 IEPs were inappropriate because (i) the IEPs lack appropriate supplemental aids, services and accommodations (particularly with respect to class size, academic schedule, unilateral hearing loss and diet); (ii) the IEPs omit extended school year

³ As of the date the due process hearing was completed in this case, the only residential school which accepted Student, Florida School, withdrew its acceptance after concluding that Mother and Petitioners’ Counsel were not supportive of Student’s being placed at the School. On March 15, 2013, before Florida School withdrew its acceptance of Student, DCPS convened an IEP team meeting to review the appropriateness of Florida School as a location of services.

services; and (iii) the IEPs omit compensatory education services.

An IEP must set forth in writing the impact of the child's disabilities, the annual "academic and functional" goals for the child, and the forms of individualized education and support that will be provided. See 20 U.S.C. § 1414(d)(1)(A). An IEP must be "reasonably calculated to enable the child to receive educational benefits" in order to adequately confer a FAPE upon a given child. *Pinto v. District of Columbia* 2013 WL 1445344, 4 (D.D.C.2013), quoting *Rowley, supra*, 458 U.S. at 207. The standard set out in *Rowley* for 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." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.)

(i) Other Aids and Services

Both the July 24, 2012 IEP and the October 19, 2012 Amended IEP specify that Student should be provided the following "Other Classroom Aids and Services" in order to access the curriculum:

Specific Behavior plan/ multiple methods of behavioral analysis and support, sensory tools and diet (consider slant board, therapy ball, air seat, etc.); fidget toy or other object to provide sensory input; reducing amount of words per page/ sentence windows, dictate responses, and read aloud for classroom work and classroom-based assessments, availability of a quiet space, amplification and/or preferred seating, supported transitions, access to word processor/computer. Core classes should be provided in the morning to the extent possible due to medication management and the wearing effects as the day progresses. Related services and electives should be provided in the afternoon to the extent possible. Dedicated aides should receive training in consultation with the parent and the MDT. Student should have access to a visual schedule that is reviewed regularly with trusted staff.

The October 2012 IEP added, to this list, "captioning where appropriate." Petitioners' evidence at the due process hearing did not establish that the additional aids services sought by the Parents in their due process complaint – supplemental aids, services and accommodations (particularly

with respect to class size, academic schedule, unilateral hearing loss and diet) – were required to provide Student “the basic floor of opportunity” described in *Rowley*. An IEP need not confer “everything that might be thought desirable by loving parents.” See *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir.1989). See, also, *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C.Cir.1989) (“proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act”). I find that Petitioners have not shown that the lists of Other Classroom Aids and Services specified in the July and October IEPs were not adequate to provide educational benefits to Student.

(ii) Extended School Year

Parents also fault the July and October 2012 IEPs for omission of Extended School Year (“ESY”) services. In *Johnson v. District of Columbia*, 2012 WL 3758240, 3-4 (D.D.C.2012), U.S. Magistrate Judge Robinson articulated the well-established standard for when ESY services are “necessary” in the context of a free and appropriate public education. “[Extended school year] services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *Id.*, quoting *MM v. School District of Greenville County*, 303 F.3d 523, 537–38 (4th Cir.2002). Petitioners’ only evidence at the due process hearing about Student’s need for ESY services was the testimony of Education Consultant that because Student has been, mostly, out of school since 2009, he will require the benefits of ESY services. Petitioners offered no evidence that addressed the standard for ESY services in *Johnson, supra* – that is, that whatever gains Student would make under his IEP during the school year would likely be jeopardized unless he receives ESY services. Petitioners have not met their burden of

proof on this issue.⁴

(iv) Compensatory Education

Lastly, with respect to the substance of the July and October 2012 IEPs, Petitioners contend that the IEPs are not appropriate for Student because the IEP team did not provide compensatory education services. In *Phillips ex rel. T.P. v. District of Columbia*, 2013 WL 1189324, 4 -5 (D.D.C.2013), U.S. District Judge Walton explained the purpose and mechanics of a compensatory education award. “[A] student can receive compensatory education as a remedy for an IDEA violation. Compensatory education is a replacement of education services the student should have received in the first place. In cases in which a compensatory education is sought, the hearing officer first determines whether there is sufficient evidence of an IDEA violation that entitles the student to a compensatory education. If the hearing officer determines there was such a violation, then the hearing officer applies the *Reid* standard⁵ to craft an award.” *Id.* (internal citations and quotations omitted).

In his decision in Case No. 2012-0020, Hearing Officer Lazan crafted a compensatory education award for Student, after determining there was evidence of an IDEA violation. The award was 5 hours a week of OT Center occupational therapy, for three months. Hearing Officer Lazan denied Petitioners’ requests for other compensatory education relief from OT Center. In the present case, Petitioners have shown no reason why Student’s IEP team was required to provide additional compensatory education in the child’s IEPs after Hearing Officer Lazan had already crafted a compensatory education award in the 2012 HOD. I find that Student was not denied a FAPE by his IEP team’s not providing additional compensatory education in the July or

⁴ To be clear, I make no finding in this decision as to whether Student does or does not need ESY services – only that Petitioners failed to meet their burden of proof on this issue. When a location is identified to implement Student’s residential placement, it may be appropriate for Student’s IEP team to revisit his need for ESY services.

⁵ *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 521 (D.C.Cir.2005)

October 2012 IEPs.

II. Were Parents' Rights to Access to Student's Education Records Denied?

- (i) Did DCPS violate the Parents' IDEA right of access to Student's educational records by withholding documents about Student that were collected, maintained or used by DCPS, such as correspondence, emails and shared notes?

Mother and Petitioners' attorney repeatedly requested copies of Student's educational records and other documents concerning Student in DCPS' custody. For example, on February 27, 2013, Mother sent Project Manager an email stating,

I would like all of [Student's] educational records, which includes all written exchanges about him among DCPS employees, between DCPS and other agencies (such as OSSE or [Department of Mental Health]) and between DCPS or OSSE and outside entities (such as schools). I can't say what you "specifically" require because I do not know what you have generated; however, it is obvious from what I've seen and have been told that there are many emails, letters, and similar documents about [Student] in DCPS' and OSSE' possession that I have never seen, such as:

1. Your instructions to the various evaluators
2. Emails that I have watched you send & receive while at IEP meetings
3. Internal emails regarding IEP meetings, scheduling, funding issues, etc.
4. OSSE's referrals to various schools and the responses it received
5. The various communications with [Massachusetts School 2] about the referral, our visit, and so forth.

DCPS must permit parents to inspect and review any education records, that are collected, maintained, or used by the agency, with respect to the identification, evaluation, and educational placement of their child, and the provision of a FAPE to the child. *See* 34 CFR §§ 300.501 (a), 300.613(a). *See, also, Jalloh ex rel. R.H. v. District of Columbia*, 535 F.Supp.2d 13, 21 (D.D.C.2008) (Parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records.) The right to inspect and review records includes the right to a response from the agency to reasonable requests for explanations and interpretations of the records; the right to request that the agency provide copies of the records containing the information, if failure to provide those copies would effectively prevent the parent

from exercising the right to inspect and review the records; and the right to have a representative of the parent inspect and review the records. *See Analysis of Comments and Changes, supra*, 71 Fed. Reg. at 46645. OSERS' intent in §§ 300.501 (a) and 300.613(a) was to adequately balance the interests of the parents for free copies and of the public agencies in controlling costs. OSERS expressly declined a commentator's suggestion that it add language in § 300.501(a) stating that parents have the right to obtain a free copy of all education records. *Id.* at 46688.

In the present case, the Parents have not shown that DCPS has denied their right to inspect and review Student's education records or that DCPS' failure to provide copies of any records has prevented them from exercising the right of inspection and review. I find, therefore, that Petitioners have not shown that Student has been denied a FAPE by DCPS' denying them access to Student's education records.

(ii) Has DCPS has violated the Parents' IDEA right to challenge the accuracy of records collected, maintained or used for Student by ignoring their requests to amend his records and by failing to follow IDEA-mandated procedures for responding to a Parents' challenge?

In a related claim, Parents contend that DCPS has violated their right to challenge the accuracy of records collected, maintained or used for Student by ignoring their requests to amend his records. In their Due Process Complaint, Petitioners allege that DCPS failed to follow IDEA mandated procedures, specifically 34 C.F.R. §§ 300.618, 300.619 and 300.620, when the Parents asked DCPS to amend Student's education records. Under the IDEA, parents who believe that information in their child's education records is incorrect may request the public agency to amend the information. If the agency refuses to amend the child's records, the parents have a right to a hearing. *See* 34 CFR § 300.618. However, a hearing requested by parents under this regulation must be conducted according to the procedures in 34 CFR § 99.22, pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g), *et*

seq. See 34 CFR § 300.621. A due process hearing officer's jurisdiction is limited to matters relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. 20 U.S.C. § 1415(b)(6). The IDEA does not empower due process hearing officers to conduct FERPA hearings. This claim must be dismissed for want of jurisdiction in this Hearing Officer.

III. Suitability of Florida School Placement

- (i) Did DCPS violate the Parents' IDEA rights by placing Student at Florida School, without first affording the Parents an IEP meeting to learn about the school and by later impeding the Parents' efforts to acquire needed information; and
- (ii) Is Florida School unable to offer Student a free appropriate public education, or if Florida School could offer Student a free appropriate public education, would DCPS' policies and practices prevent Student from receiving FAPE there?

On February 28, 2013, DCPS issued a Prior Written Notice notifying Parents that Student would receive services under the October 19, 2012 Amended IEP at Florida School, a residential facility. Parents objected to this placement and, on April 8, 2013, filed their due process complaint initiating this case. During the pendency of this case, on April 29, 2013, Florida School informed DCPS that it was no longer willing to accept Student's referral because Mother and Petitioners' counsel were not supportive of Student's being placed there. Petitioners contend that DCPS violated their IDEA rights by placing Student at Florida School without convening an IEP meeting and by impeding their efforts to obtain information about Florida School.

At the beginning of the due process hearing on May 6, 2013, DCPS made an oral motion to strike Petitioners' claims regarding Student's placement at Florida School, because the Florida School placement was no longer available. At the time, I overruled DCPS' motion. After reviewing the controlling case law on the mootness doctrine, I now reconsider that decision and

will dismiss Petitioners' claims relating to the placement of Student at Florida School.

The Circuit Court for the District of Columbia explained in *District of Columbia v. Doe*, 611 F.3d 888 (D.C.Cir. 2010) that “the mootness doctrine prohibits us from deciding a case if ‘events have so transpired that the decision will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.’ *Clarke v. United States*, 915 F.2d 699, 701 (D.C.Cir.1990) (en banc) (internal quotation omitted). . . . There is a mootness exception, however, if an action is ‘capable of repetition, yet evading review.’ *Jenkins v. Squillacote*, 935 F.2d 303, 308 (D.C.Cir.1991). The exception applies where: ‘(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party will be subject to the same action again.’ *Id.* at 307(internal quotation omitted).” *Doe*, 611 F.3d at 894.

In this case, because Florida School has withdrawn its acceptance of Student, any decision I make on the appropriateness of the Florida School placement, when it was made, would not “presently affect the parties’ rights.” The “capable-of-repetition” exception to the mootness doctrine does not apply because, while the alleged IDEA violation – placing Student in a residential school, without first affording the Parents an IEP meeting to learn about the school – is capable of repetition, the action does not evade review. Under the IDEA, if parents disagree with the LEA’s placement of their child, they may request an administrative due process hearing before an impartial hearing officer. 20 U.S.C. § 1415(f)(1). The hearing officer’s final decision must be delivered within 45 days after expiration of the 30 day resolution period. *See* 34 CFR § 300.515(a). During the pendency of any due process hearing and subsequent judicial appeal, the parents may require that the child remain in his current educational placement. *See* 34 CFR § 300.518(a).

I conclude, therefore, that if DCPS were again to place Student at a residential school or

other educational setting, without first affording the Parents an IEP meeting to learn about the school, as allegedly occurred in this case, the Parents could request another due process hearing. The challenged placement would then be subject to an “automatic injunction” under the IDEA’s “stay-put” provision, and could be fully litigated prior its implementation. *See Johnson v. Dist. of Columbia*, 839 F.Supp.2d 173 (D.D.C.2012) (The IDEA’s stay-put provision has been interpreted as imposing an automatic statutory injunction.) Because the challenged placement would not be, in its duration, too short to be fully litigated prior to its cessation or expiration, the capable-of-repetition exception does not apply. Accordingly, I dismiss, as moot, Petitioners’ claims that DCPS violated the IDEA by placing Student at Florida School.⁶

Summary/Conclusions

In my prehearing order in this case, I certified for hearing six issues asserted by the Petitioners on behalf of Student. Two of the claims – those relating to Student’s placement at Florida School – must be dismissed as moot because the placement became inoperative after Florida School withdrew its acceptance of Student. A third claim, for DCPS’ alleged failure to respond to Parents’ request to amend the information in Student’s education records, must be dismissed for want of subject matter jurisdiction.

Petitioners have not met their burden of proof to establish that DCPS’ July and October 2012 IEPs were not reasonably calculated to provide Student educational benefits, save for the omission in the October 19, 2012 Amended IEP to specify Student’s requirement for residential placement. I have found that this omission was a procedural violation of the IDEA which did not result in denial of FAPE.

⁶ Although I am now dismissing Petitioners’ Florida School claims, I note that in three days of hearings and over 1,500 pages of Petitioners’ exhibits, there has been no showing that Florida School was not a school capable of fulfilling Student’s October 19, 2012 IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991).

I have found that DCPS' refusal to pay for Tutor's attendance at all of Student's IEP meetings was also a procedural violation of the IDEA. This violation also did not result in loss of educational opportunity for Student or seriously deprive Parents of their participation rights because Tutor did, in fact, attend all of the meetings when the July and October 2012 IEPs were developed.

Lastly, I have found that Petitioners failed to establish that DCPS denied them their IDEA right to inspect and review Student's education records.

In summary, I conclude that, with respect to the specified issues certified to be resolved in this case, Petitioners have failed to establish that DCPS has denied Student a free appropriate public education. There is no basis, therefore, to order any relief. *See District of Columbia v. Pearson*, 2013 WL 485666, 6 (D.D.C. 2013) (Because there was no determination made at the hearing that DCPS had violated any of student's rights, as there was no denial of a free appropriate public education, the hearing officer had no substantive basis to order that the District increase its services.)

ORDER

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

1. The Petitioners' claim concerning whether DCPS violated their right to challenge the accuracy of Student's education records is dismissed for want of subject matter jurisdiction;
2. The Petitioners' claims concerning whether DCPS violated their rights by placing Student at Florida School and whether Student is unable to receive a free appropriate public education at Florida School are dismissed as moot; and
3. All other relief requested by the Petitioners herein is denied.

Date: May 30, 2013

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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