OSSE
Student Hearing Office
October 7, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

[Local Education Agency],

Respondent.

Date Issued: October 4, 2013

Hearing Officer: Jim Mortenson

Case No:

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on July 23, 2013. The Petitioner and Respondent are both represented by counsel. A response to the complaint was filed by the Respondent on August 5, 2013. A resolution meeting was held on August 7, 2013, and resulted in no agreements. A prehearing conference was convened on August 12, 2013, and a prehearing order was issued on that date.

The Petitioner filed a motion on August 16, 2013, to permit issues in the complaint more than two years old to proceed. The Respondent filed a reply to this motion on August 22, 2013. A second prehearing was held on August 23, 2013, and a second prehearing order was issued on that date. That order, among other things, denied the Petitioner's motion and certified the four issues, stated below, for hearing.

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ce policy and are referenced in Appendix C which is to be removed prior to public dissemination.

The Petitioner filed a motion, on September 16, 2013, to permit one of her witnesses to testify via telephone, and this motion was granted on September 20, 2013. The Petitioner filed the required prehearing brief on September 16, 2013, and the Respondent failed to adhere to this requirement. Both parties exchanged disclosures for hearing on September 16, 2013.

The hearing was convened at 9:00 a.m. on Monday, September 23, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing recessed at 5:15 p.m .and resumed at 9:00 a.m. on Tuesday, September 24, 2013. The hearing recessed at 12:35 p.m. that day and resumed for a final third day at 9:00 a.m. on Wednesday, September 25, 2013, and concluded that afternoon. The hearing was closed to the public. The Petitioner attended the hearing with her counsel and an agent of the Respondent did not attend the hearing with its counsel as agreed upon and required.

Closing arguments were filed Friday, September 27, 2013. The due date for this Hearing Officer's Determination (HOD) is October 6, 2013. This HOD is issued on October 4, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) are:

1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it did not provide the Student with an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of other needs resulting from

disability, because the IEP in all its revisions since July 23, 2011: 1) lacked an accurate statement of the Student's present levels of academic achievement and functional performance (because the Respondent did not rely on current or accurate evaluation data); 2) lacked measurable annual goals designed to enable the Student to be involved in and make progress in the general education curriculum; 3) lacked the type and quantity of related services recommended and supplementary aids and services, such as a behavior intervention plan (BIP) and appropriate extended school year (ESY) services, necessary to meet appropriate goals and to make academic and functional progress; 4) lacked a full-time therapeutic education setting; 5) was not revised following hospitalizations; and 6) was not revised at IEP team meetings that included the required team members, such as related service providers?

2) Whether the Respondent denied the Student a FAPE when it failed to provide special education and related services in conformity with IEP since July 23, 2011, including specialized instruction, a BIP, and other related services?

3) Whether the Respondent failed to ensure evaluations were conducted upon parental request and that assessments were completed in all areas related to the suspected disability, since July 23, 2011?

4) Whether the Respondent changed the Student's educational placement without convening the placement team or providing the parent prior written notice, when it unilaterally moved the Student from Prospect Learning Center to Payne Elementary School?

The Petitioner is seeking prospective placement of the Student at the Non-public School. The Petitioner is also seeking compensatory education to make up for trivial, if any, academic and functional progress over the last two years, consisting of: five hour per week of tutoring in reading, writing, and mathematics; 90 minutes per week of counseling services; one hour per week of speech and language services; and one hour per week of occupational therapy. The Petitioner is seeking an independent educational evaluation consisting of: a comprehensive psychoeducational assessment; an occupational therapy (OT) assessment; a speech and language assessment; and a functional behavioral assessment (FBA).

The Respondent denied the Student a FAPE when it did not provide the Student with an IEP reasonably calculated to enable the Student to be involved in and make progress in the general

education curriculum, and meet each of other needs resulting from disability, because the IEP in all its revisions since July 23, 2011, lacked measurable annual goals designed to enable the Student to be involved in and make progress in the general education curriculum (many goals were not measurable nor were they annual) and lacked a BIP necessary to help the Student meet appropriate goals and to make academic and functional progress. The IEP revisions included accurate statements of the Student's present levels of academic achievement and functional performance. The Student was placed in a full-time special education setting. While the IEP was not revised following each of the Student's hospitalizations, there is no requirement for that to occur and no evidence the Petitioner ever requested a meeting and was denied. The Petitioner has not shown that IEP team meetings lacked the minimally required team members.

The Respondent denied the Student a FAPE when it failed to provide special education and related services in conformity with IEP since July 23, 2011. Approximately one third of the behavior support services the Student required were not provided and no specialized instruction was provided during the 2012-2013 school year when the Student was not taught by a licensed special education teacher.

The Respondent failed to ensure the OT assessment requested by the Petitioner was provided or that a written notice of its refusal to conduct the assessment was provided.

The Petitioner did not show the Respondent changed the Student's educational placement when it assigned to School C for the 2013-2014 school year, following the closure of School B.

IV. EVIDENCE

Ten witnesses testified at the hearing, five for the Petitioner and five for the Respondent. The Petitioner's witnesses were: the Petitioner herself (P); an Administrator from the Non-public School (J.C.); an Education Advocate, (J.F.), who provided an expert opinion on the Student's educational programming and placement; Pediatrician, (T.K.), who provided an expert opinion on the Student's needs based on disabilities and the therapies and environment requires for education; and an Investigator (A.E.). The Respondent's witnesses were: a School Social Worker, (T.W.), who previously working with the Student; a Special Education Teacher, (A.M.); a Dedicated Aide, (W.F.); a Special Education Coordinator, (R.H.); and a School Social Worker, (L.W.), who currently works with the Student.

77 of the Petitioner's 85 disclosures were entered into evidence. An additional exhibit, P 86, was entered from the Respondent's disclosures that the Respondent had not yet offered into evidence (originally marked for identification as R 8). The Petitioner's exhibits are listed in Appendix A. Ten of the Respondent's 48 disclosures were entered into evidence (not including R 8 entered as P 86). The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any credibility issues are specifically noted in the findings of fact. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

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

1. Student is a child with a disability enrolled at School C.[2] The Student has severe psychiatric issues, as well as significant physical issues.[3] There are relationships between the psychiatric issues and physical issues, but the psychiatric issues are primarily impacting the Student's involvement and progress in the general education curriculum.[4] The Student has been identified by the Respondent as a child with an Emotional Disturbance.[5] The Student is capable of learning and progressing in the general curriculum.[6]
2. The Student was evaluated in 2007, at four years of age, with both a speech and language assessment and a comprehensive psychological assessment.[7] The speech and language assessment concluded that the Student appeared to have adequate speech and language skills, but that attending and noncompliant behaviors impeded the assessment process and also had the potential to negatively affect future social and academic success.[8] The psychological assessment concluded that the Student had average academic abilities, and clear behavior problems, including aggression and defiance.[9]

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[2] Testimony (T) of P, T of R.H., T of A.M.
[3] T of T.K. (The specific issues are not necessary to be listed and may provide personally identifiable information if they were. According to T.K. the Student's chief issue, however, is Oppositional Defiant Disorder.)
[4] T of T.K., T of J.F., P 37, P 38, P 46, P 47.
[5] P 58.
[6] T of J.F., T of T.K., P 45, P 47, P 50, P 51, P 52, P 56, P 58.
[7] P 36, P 37.
[8] P 36. (The Petitioner has argued that the Student has a need for speech therapy, but the evidence provided to support this does not. In addition to P 36, the Petitioner relies of P 6, which is a hospital discharge document that refers to a severe expressive and receptive language disorder, based on the staff's review of outside records. There is no indication what the "outside records" the discharge summary is referring to, and no evidence has been provided showing the Student has any language disorder other than the testimony of T.K. However, T.K. did not conduct a speech and language assessment of the Student and it is unclear where her knowledge about any speech and language needs of the Student came from.)
[9] P 37.

3. When the Student was evaluated in March 2011, the most recent psychological evaluation prior to the IEP revision of August 31, 2011, the Student had a history of significant difficulties with social-emotional/behavioral control within the school environment.[10] volatile behaviors significantly impacted educational performance and general level of functioning in the school setting.[11] Behaviors included: physical and verbal aggressiveness towards peers and staff; noncompliance with school staff; refusal to follow school rules; attempts at self-injurious behaviors; low frustration tolerance; impulsivity; and restlessness.[12] These behaviors created an unsafe environment for the Student and others, and impacted peer relations.[13]
4. The Student's disabilities affected involvement and progress in the general education curriculum by rendering unavailable to receive instruction.[14] As a result, academic achievement, at the time of the March 2011 evaluation during second grade, included reading at or below a first grade level and inconsistent achievement in math.[15] The Student also had inconsistent work habits and cognitive functioning was in the borderline to low average range, overall.[16]
5. The Student's significant behaviors, not specifically spelled out here, continued through the 2011-2012 and 2012-2013 school years, decreasing with time to the present.[17] The Student

[10] P 38.
[11] P 38.
[12] P 38.
[13] P 38.
[14] P 38.
[15] P 38.
[16] P 38. (J.F. opined that the March 2011 evaluation was not complete because of its reliance on the Reynolds Intellectual Assessment Scales (RAIS), a shorter and less comprehensive assessment, as compared to an assessment such as the Wechsler Preschool and Primary Scale of Intelligence that was used previously with the Student in 2007. However, the results of both assessments are consistent with each other, and so it was reasonable for the Respondent to rely on the RIAS and not conduct a more involved cognitive assessment. T of J.F., P 37, P 38.)
[17] T of P, T of J.F., T of W.F., T of T.W., P 10 through P 32.

continues to have outbursts during the current school year, but behaviors have not been as severe as in the past.[18]

6. The IEP was revised during the Student's second grade year, on March 29, 2011, more than two years prior to the filing of the present complaint, and was not timely challenged.[19]
7. Inexplicably, the Student was moved from the second grade in the Spring of 2011 to the fourth grade in the Fall of 2011 and was never provided third grade curriculum.[20]
8. The next revision, within the two years prior to the filing of the complaint, was made at a team meeting on August 31, 2011, and included an accurate statement of the Student's present levels of academic achievement and functional performance.[21] The IEP team included: the Parent; the Student; the Special Education Coordinator; the Special Education Teacher; and the Dedicated Aide.[22] The Student's Regular Education Teacher did not attend, but only bus transportation was being reviewed and changed.[23] The Student's disabilities primarily affect functional performance, which results in not being available for learning in the classroom, and this is reflected multiple times in the IEP.[24] The IEP also documents the Student's specific academic achievement as a result of lack of availability for learning.[25] The IEP includes the same goals that had been in place since at least the January 11, 2011, revision of the IEP, which had been expected to be met by January 2012, and were now expected to be met by March 28, 2012.[26] The IEP also provided for 25 hours per week of unspecified specialized instruction outside of the general education setting, 120

[18] T of A.M., T of L.W., T of J.F.
[19] P 47.
[20] P 47, P 51. (At no time, even in its response to the complaint, has the Respondent refuted this.)
[21] P 50.
[22] P 50.
[23] P 50, P 65.
[24] P 50.
[25] P 50.
[26] P 45. P 47. P 50.

minutes per month of unspecified behavior support services outside of the general education setting, and a dedicated aide, among other supports and services.[27] The IEP no longer included a BIP that had been developed on March 29, 2011.[28]

9. The IEP was revised again, in December 2011, with an amendment to increase specialized instruction hours to 31.5 hours per week outside of the general education setting.[29]

10. The IEP was revised again, on February 13, 2012, during an IEP team meeting.[30] The team included: the Parent; the Special Education Teacher; the Agency Representative; and several others.[31] The Regular Education Teacher was excused.[32] The statement of the Student's present level of academic achievement and functional performance was revised to reflect that there was a decrease in behavior problems, but that the Student was still unavailable for learning due to lethargy and sleeping in class, possibly related to changes in medication.[33] All of the goals in the IEP remained the same, but one writing goal was added and the goals were now to be met by February 2013.[34]

11. The Student concluded the 2011-2012 fourth grade year without a "secure" skill level in any academic area and most of scores were "beginning" (44 of 55 skill areas scored).[35] overall grades were "Approaches the Standard" in English Language Arts, Mathematics, Social Studies, and Science.[36] The Student met the standard in Health & Physical Education

[27] P 50
[28] P 48, P 50.
[29] P 51.
[30] P 52.
[31] P 52.
[32] P 52. (Presumably because the Student was no longer receiving any regular education.)
[33] P 52, P 34.
[34] P 52.
[35] P 62. (The report card includes "Secure," "Developing," "Beginning," and "Not Introduced" scores for skills and expectations in subject areas.)
[36] P 62.

(even though grades in the six skill areas measured were only "developing").[37] None of the Student's work habits and personal and social skills were graded as being used "independently."[38]

12. The IEP progress reports for the year do not state whether or not progress (where progress is noted) is sufficient to enable the Student to reach the goal by the end of the year.[39] In some cases the Student made no progress.[40] The Student remained in the fourth grade for the 2012-2013 school year.[41]

13. The Student had been hospitalized for psychiatric reasons nine times between January 2009 and June 2011.[42] has been hospitalized three times over the last two years: 11 days in September 2011 for "Danger to self/others;" four days in August 2012 for setting fire to a mattress and destroying the residence; and seven days in March 2013 for increased aggression, eating, and encopresis over a period of three weeks coinciding with the Petitioner's break-up with her fiancé and the family moving in with extended family.[43]

14. On September 13, 2012, the Petitioner requested an OT assessment for the Student.[44] The assessment was never completed and no written notice of a refusal is part of the record.[45]

15. The IEP was next revised at a team meeting on December 13, 2012.[46] The team included the Parent; the Special Education Teacher; the Agency Representative; and the Social Worker.[47] The statement of the Student's present level of academic achievement and functional

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[37] P 62.
[38] P 62. (These skills are graded as being used "Rarely," "With Frequent Prompting," "With Limited Prompting," and "Independently.")
[39] P 61.
[40] P 61.
[41] P 56, P 62, P 64.
[42] P 8, P 9.
[43] P 7, P 8, P 9.
[44] P 53.
[45] T of P.
[46] P 56.
[47] P 56.

performance was revised to reflect continued behavior problems affecting involvement in the classroom.[48] The IEP includes two of the same prior math goals and replaces two others.[49] Four of the five prior reading goals are kept, and one is replaced.[50] The writing goal did not change.[51] Most of the functional goals in the area of emotional, social, and behavioral development had modified language, but were essentially the same as the prior goals, and two of the goals, concerning self-management, were essentially the same.[52] The IEP included 31.5 hours of unspecified specialized instruction outside of the general education setting, an increase to three hours per month of unspecified behavioral support services, and a dedicated aide, among other supports and services.[53]

16. No BIP had been in place for the Student until March 2013, and that BIP was not written by the IEP team and it is not clear it was incorporated into the IEP.[54]
17. The last IEP revision occurred with an amendment on April 10, 2013, to change the ESY service dates.[55]
18. A so-called functional behavioral assessment was conducted, based on two observations of the Student, one in September 2012, and the other in June 2013, and a report written on or about June 17, 2013.[56]
19. By the third term of the 2012-2013 school year, the Student was scored as "developing" in most of the scored skills areas.[57] Approximately seven skill areas had not been introduced by

[48] P 56.
[49] P 56.
[50] P 56.
[51] P 56.
[52] P 56.
[53] P 56.
[54] P 57, T of T.W.
[55] P 58.
[56] P 39.

the end of the third term across all 57 skill areas measured, yet despite this and the lack of any "secure" scores, all subjects measured recorded the Student as meeting the standard, overall, except for Health & Physical Education were the Student was scored as approaching the standard (and had been scored as meeting the standard the prior year).[58] Thus, the report card for the 2012-2013 school year is not very reliable evidence of the Student's academic achievement.

20. The IEP progress reports for the year do not state whether or not progress (where progress is noted) is sufficient to enable the Student to reach the goal by the end of the year.[59] In some cases the Student regressed or the goal had not been introduced.[60] Despite not reaching the functional goals in the IEP, which have been extended and only semantically revised, the Student's behavior has slowly improved since attempting to burn down the residence and kill brother in August 2012.[61]

21. Most of the Student's goals in the IEP revisions for the 2011-2012 and 2012-2013 school years were not measurable.[62] The goals often lacked base-line data and were not drawn from the stated needs of the Student.[63]

22. From the 2011-2012 and the 2012-2013 school years, the Respondent failed to provide Isaiah with almost one third of the behavioral support services required by IEP.[64] During the

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[57] P 64. (In math, a different set of skills was being taught, despite the Student not having secured the math skills required the year before. Also, a final report card for the year was not offered into evidence by either party, and so the most recent grades are from the end of the third term.)
[58] P 64.
[59] P 63.
[60] P 63.
[61] P 8, P 9, P 10 through P 32, P 45, P 47, P 50 through P 52, P 56, P 58, T of P, T of L.W., T of T.W., T of W.F., T of A.M.
[62] T of J.F., P 50, P 51, P 52, P 56, P 58.
[63] T of J.F., P 50, P 51, P 52, P 56, P 58.
[64] P 69, P 70.

2012-2013 school year the Respondent failed to provide any specialized instruction required by the IEP because the Student was not taught by a licensed special education teacher.[65]

23. At the end of the 2012-2013 school year School B closed down.[66] The Student was reassigned to School C for the 2013-2014 school year by the Respondent, and IEP was not changed until after began attending, reducing hours of specialized instruction from 31.5 to 27.5 per week.[67] The Student has been in classrooms outside of the general education setting at both schools, but School C has both non-disabled students as well as students with disabilities attending.[68] Both schools had related service providers available to deal with behavioral problems.[69]

24. Thus far, in the 2013-2014 school year, the Student continues to exhibit some behavioral problems at school, but has not had as severe episodes as had during the prior two years.[70]

25. The Non-public School can meet all of the Student's unique needs.[71] The Non-public School implements both a school-wide and individualized BIP.[72] The Student will have access to the general education curriculum for the District of Columbia, including remedial education.[73] The Non-public School has an integrated, therapeutic approach in which all service providers working with the Student are knowledgeable about the Student's plan and how to implement it.[74] The Non-public School's staff, including the dedicated aides, is trained quarterly in behavior intervention techniques and in working with children with emotional disturbance,

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[65]

[66] T of P.
[67] P 67, T of A.E., T of L.W., T of R.H.
[68] T of J.F., T of A.E., T of R.H.
[69] T of T.W., T of L.B., T of W.F.
[70] T of A.M., T of L.B., T of W.F., T of J.F.
[71] T of J.C., T of J.F.
[72] T of J.C.
[73] T of J.C.
[74] T of J.C.

and it boasts the sort of school-wide behavior intervention system which is expected to work for the Student.[75] The Non-public School is capable of implementing the Student's IEP.[76]

VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. The stated purpose of the IDEA is "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." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

> special education and related services that –
> (a) Are provided at public expense, under public supervision and direction, and without charge;
> (b) Meet the standards of the SEA, including the requirements of this part;
> (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

[75] T of J.C., T of J.F.
[76] T of J.C.

34 C.F.R. § 300.17. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). In providing a FAPE states and the District of Columbia must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 203 (1982). The special instruction and services "must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's [individualized educational program]." Id. In Rowley, the Supreme Court held that courts in the position of assessing whether a child is receiving FAPE must focus on whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201. The Court noted further that there existed "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. 198. However, "[a]cademic success *is* an important factor 'in determining whether an IEP is reasonably calculated to provide education benefits.' Roark ex rel. Roark v. District of Columbia, 460 F.Supp.2d 32, 44 (D.D.C. 2006) (emphasis added). Accord Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir.1998) ("An appropriate public education under IDEA is one that is 'likely to produce progress, not regression.' ") (citations omitted); Danielle G. v. N.Y. City Dept. of Educ., 2008 WL 3286579, at *7 (E.D.N.Y. Aug. 7, 2008) ("A school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under IEP, and if the IEP affords the student with an opportunity 'greater than mere trivial advancement.' ") (citations omitted); P.K. v. Bedford Cent. Sch. Dist., 2008 WL

2986408, at *11 (S.D.N.Y. Aug. 1, 2008) (”[I]n determining whether a school district has met its obligations under the IDEA, a court must look for objective evidence in the record indicating whether the student would likely have progressed or regressed under the challenged IEP). See Hunter v. District of Columbia, 2008 WL 4307492 at *7 (D.D.C. 2008). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide education benefits. Suggs v. District of Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under current educational program, *see* Reid v. District of Columbia, 401 F.3d [516,] 519-20 [(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately monitored, *see* Harris v. District of Columbia, 561 F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate educational difficulties. *See* Gellert v. District of Columbia Public Schools, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” Suggs, 679 F. Supp. 2d at 51-52. This line of reasoning is consistent with the statute and regulations themselves. The IEP is a living document that, once initially created and consented to, is reviewed “periodically, but not less than annually, to determine whether the annual goals for the child are being achieved[.]” 34 C.F.R. § 300.324(b). The IEP must then be revised 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)(2)(ii). Thus, if the IEP is not revised to address, for example, a lack of expected progress, this is another denial of FAPE.

3. Federal Regulations at 34 C.F.R. § 300.320 require, in part, the following components in an IEP:

> (a)(1) A statement of the child's present levels of academic achievement and functional performance, including—
> (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
> (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
> (2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
> (A) 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
> (B) Meet each of the child's other educational needs that result from the child's disability;

4. District of Columbia Municipal Regulations provide, regarding IEP development, that:

> In developing an IEP for a child with a disability, the IEP team shall consider and document:
> (a) Strengths of the child;
> (b) Concerns of the parent for enhancing the education of the child;
> (c) Results of the initial or most recent evaluation; and
> (d) As appropriate, the results of the child's performance on any District-wide assessment programs.

and

> If a child's behavior impedes the child's learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

D.C. Mun. Regs. 5-E3007.2 and 5-E3007.3.

5. Pursuant to 34 C.F.R. § 300.321(a), an IEP team must, in relevant part, minimally include:

> (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 . . .;
> (4) A representative of the public agency who-
> (i) Is qualified to provide, or supervise the provision of, specially designed instruction. . .;
> (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. The Petitioner presented evidence in the form of both the IEPs and expert testimony that shows, by a preponderance of the evidence, that the majority of goals in the IEP during its revisions over the last two years were not measurable and often lacked a connection with the documented present levels of academic achievement and functional performance. The Respondent did not refute this evidence. Further, the fact that the goals did not change over time, and there was no significant academic progress, demonstrates the IEP's failure to be reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, i.e. receive educational benefit. In addition to this substantive flaw in the IEP is the lack of the required BIP. While a BIP was created during the 2010-2011 school year, it was not part of the IEP revision near the start of the 2011-2012 school year. The Respondent employed an ad hoc approach, not an individualized approach to dealing with the Student's significant behaviors, which prevented from not only making meaningful functional progress but, critically, academic progress. The IEP, including the BIP, is the tool to enable a child with a disability that has challenging behaviors, like the Student, to be involved in and make progress in the general education curriculum. Given the Student's cognitive ability, it seems odd would have any academic goals in IEP when disabilities first affect daily functioning. Had behavior been properly addressed, would likely have been progressing the curriculum as any child without a disability, and this is supported by the testimony of the educational expert, J.F, as well as the IEP team's determination that the Student's academic progress would be assessed using the same State-wide assessments used for children without disabilities, and not an alternative or modified assessment. The Respondent's failure to provide the Student with access to the third grade curriculum is unexplained and is also a denial of FAPE, since and "appropriate. . .

elementary school" education is one of the required components of a FAPE. *See*, 34 C.F.R. § 300.17(c).

7. The statement of the Student's present levels of academic achievement and functional performance were reasonably constructed. The Petitioner argues that they did not reflect the "whole" child because there was no mention of, for example, over-eating. The IEP, over the last two years, reflected the data in the evaluation reports as well as updates presumably provided based on teacher observation. While the Respondent could have included observations about the Student's over-eating and its effect on educational performance, there was already sufficient data on how the Student's disabilities were impacting educationally, and programming to address that could have been constructed. It simply was not. The Petitioner's witness, J.F., also provided opinions about IEP development that were based on best practices, but not what is minimally required in an IEP. For example, she testified that the statement of the Student's present levels of academic achievement and functional performance must include the date the data was collected. There is no such requirement in the law. She testified that the IEP team should have met following each of the Student's hospitalizations. Again, there is no such requirement. Had the Petitioner felt it was necessary to meet, she could have convened the IEP team and there is no evidence she did so or that the Respondent refused a team meeting requested by the Petitioner. She testified that the person who conducted an assessment must be in attendance at the IEP team meeting to explain the assessment. Again, the law only requires the attendance of someone who can interpret assessment results, not necessarily the person who conducted the assessment. These are just some examples of what can only be referred to as best practices, not legal requirements, that the Petitioner argues should have been followed. In any event, the lack of

appropriate measurable annual goals and a BIP are significant and substantive violations that resulted in the Student's lack of overall educational progress and has resulted in a denial of FAPE.

8. When considering a failure to provide special education and related services in conformity with the IEP, the IDEA "is violated when a school district deviates materially from a student's IEP." Wilson v. D.C., 770 F.Supp. 2d 270, 275 (D.D.C. 2011), citing: Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."); accord S.S. ex rel. Shank v. Howard Road Acad., 585 F. Supp. 2d 56, 68 (D.D.C. 2008); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), aff'd sub nom. E.C. v. District of Columbia, No. 07-7070 (D.C. Cir. Sept. 11, 2007). "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail" on a failure-to-implement claim. Wilson, at 275 (emphasis in original), citing: Van Duyn, 502 F.3d at 822 (emphasis added); cf. MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). "Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." Id., See, e.g., Van Duyn, 502 F.3d at 822; S.S., 585 F. Supp. 2d at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

9. In this case, the Petitioner has shown, and the Respondent has not refuted with any evidence that a significant amount of related services, specifically the essential behavioral support services, were not provided over the last two years. Just as significantly, the Respondent failed to provide any specialized instruction during the 2012-2013 school year when it failed to provide the Student with a qualified special education teacher. Both of these failures amount to a material deviation from the Student's IEP and are, thus, a denial of FAPE.

10. Pursuant to 34 C.F.R. § 300.303(a):

> A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311 —
> (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
> (2) If the child's parent or teacher requests a reevaluation.

11. The Petitioner argues that the Student was both identified as a Student with a speech and language problem that went unaddressed and that required a new speech and language assessment. The Petitioner has not made a showing of either of these assertions. The Petitioner relies on a report by medical staff and the testimony of T.K. that the Student has severe expressive and receptive language needs. The medical staff report is based on a review of records unknown to the IHO and the foundation for T.K.'s statement is also unclear. The Petitioner provided an assessment report that showed the Student had no speech and language needs. The more reliable evidence is the assessment report, not the hearsay in the discharge summary or T.K.'s unexplained statement. Further, the speech and language evaluation removes any indication that the Student has speech and language needs and there was no reason presented to suspect such needs now.

12. The Petitioner has shown she requested an OT assessment at least in September 2012. There is no notice of a refusal or a proposal to conduct the assessment or an assessment report demonstrating the OT assessment was completed. Thus, this failure to timely complete the

OT assessment, or provide a written justification for refusing it, must result in the completion of the assessment at this time. Only after a review of the assessment results can the IEP team then determine whether any OT services are required.

13. A placement decision is made, in the District of Columbia, by the IEP team. *See* D.C. Mun. Regs. 5-E3001.1. The Office of Special Education Programs (OSEP) analyzed the question of "whether a public school board has the unilateral discretion under the [IDEA] to choose the educational placement of a child with a disability as an administrative matter to the exclusion of any input from that child's parents." Letter to Veazey, 37 IDELR 10 (OSEP Nov. 26, 2001). The answer is no, but the matter is more complicated because of the vagaries of what is a "placement." The selection of a particular location for services (the physical surrounding, such as the classroom) is not a change in placement. 71 Fed. Reg. 46588-89 (August 14, 2006). According to OSEP:

> Historically, we have referred to ''placement'' as points along the continuum of placement options available for a child with a disability, and ''location'' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

Id. at 46588. "[T]here is not a change in 'educational placement' under the IDEA where a student is placed in a new program where all the basic elements are fundamentally the same as the prior placement[,]" and "a change of location alone does not constitute a change in 'educational placement' under the IDEA." D.K. v. District of Columbia, Civ. 13-110, p. 10 (D.D.C. 2013).

14. In this case, the Student's prior school, School B, closed and the Student was assigned to current school, School C. The Petitioner has not shown that this was a change in educational placement. The Petitioner's strongest arguments are that School B did not have students

without disabilities attending whereas School C does, and that the hours of specialized instruction in the Student's IEP was reduced by four hours per week to meet the schedule of School C. In this case, even these two factors together do not show that basic elements of the Student's program were changed. IEP did not specify that required isolation from non-disabled peers entirely, only that specialized instruction would be provided outside of the general education setting, just as it was at School B. The Student's specialized instruction at School C is provided outside of the general education setting. The reduction in hours is more troubling as an IEP is, by definition, to be formulated based on the needs of the Student, not the education agency. However, in this case the four hour reduction in hours does not appear to be detrimental to the Student and the evidence is that the Student has adapted well to the new school, even with the flawed IEP. Thus, even though there was a slight change to the IEP, the Student's educational placement was not fundamentally altered.

15. The Petitioner has made a great deal of the Student's psychiatric hospitalizations, three of which occurred since the start of the 2011-2012 school year. These hospitalizations show the Student has had serious difficulties resulting from disabilities. The Petitioner's blame for the hospitalizations on the Respondent is misplaced, however. The Student's psychiatric condition is the cause of these hospitalizations, not education, or even a poor education. While appropriate educational services may have positively impacted the Student to the extent that would not have required hospitalization at times, it is important to note that the Respondent's job is to educate the Student, not treat condition, and this case does not draw a connection between any hospitalizations and the Respondent's failure to provide a FAPE to the Student.

16. The Respondent makes several arguments that must also be addressed. One is that the Petitioner did not present any witnesses from IEP team meetings who worked with the Student in the education environment (although the Respondent did). The Respondent did not explain how the presentations of such witnesses would have been important to the Petitioner's case. The Respondent also argues that "team agreement is the hallmark of appropriateness" in considering an IEP. The Respondent provides no legal support for this position. There are specific requirements for an IEP. (*See, e.g.,* 34 C.F.R. § 300.320). The law requires constant monitoring of a student's progress and provides for meetings to review and revise the IEP when progress is not what is expected. (*See*, 34 C.F.R. § 300.324). It also anticipates disagreement and permits challenges up to two years following an alleged violation. Thus, to assert that an IEP team agreement must result in a determination that an IEP is appropriate would give the IEP team greater authority than it has. Additional, Courts in the District of Columbia have determined that evidence of educational progress is an important factor to consider. *See, e.g.* Reid. The Respondent also argues that evaluations do not need to be in documented form, without citation. The reason for the lack of citation is that the law explicitly requires both assessment results as well as final evaluation reports to be written. *See, e.g.,* D.C. Mun. Regs. 5-E3005.3(b) and 5-E3006 (Assessment reports will result in an evaluation report). Finally, while the subjective observations of teachers and service providers are important evidence to consider, they do not supplant the objective monitoring of student progress. A statement that a student "is doing better" must be weighed in relation to all the other data, including academic progress reports. Further, the progress reports, to be given meaningful weight, must be thorough and meaningful. Whether a student can read, write, or perform mathematical calculations can be objectively measured against

the State educational standards. This is not the sole criteria to measure educational progress, but it is more significant than a teacher's unsupported statement about a student "doing better."

17. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel, Reid v. District of Columbia, 401 F.3rd 516, 523, (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., *citing* Reid, 401 F.3d at 524; *see* Stanton ex rel. K.T. v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010).

18. The Petitioner argues that the Student is entitled to both a prospective placement as well as a compensatory remedy for the denials of FAPE herein. "[P]rospective relief [is] aimed at ensuring that the child receives tomorrow the education required by IDEA." Branham v. District of Columbia, 427 F. 3d 7, 11, (D.C. Cir. 2005). The Student's IEP must be revised, without question, but the Petitioner provided no clear evidence about what those revisions

should be. Rather, she argued for prospective placement at the Non-public School that could meet the Student's needs. The Petitioner also seeks "retrospective relief designed to compensate for *yesterday's* IDEA violations[,]" consisting of tutoring and related services. Id. (Emphasis in original.) While the Branham Court distinguished tutoring as retrospective and placement at a non-public school as prospective, it did not (and given the broad authority noted by the Supreme Court in Burlington, could not) restrict all awards of tutoring and private placement into such categories. Rather, the aim of the Court in Branham appears to be to categorize award based on their purpose, whether retrospective or prospective. Indeed, tutoring could be prospective in nature just as private placement could be retrospective to correct for a prior deficiency, under the right circumstances. In this case, the Student's current school appears to be an improvement over the prior school, thus far. made no measurable academic gains over the last two years, however, and requires significant remediation to bring up to learning the academic standards for students age. The Non-public School the Petitioner has selected can do just that. With time and the services provided by the Non-public School, the Student can reasonably be expected to be where should have been, educationally, but for the denials of FAPE. Thus, as compensatory education the Student will, rather than be presented with tutoring outside of school, will be provided with the comprehensive academically remedial and functionally supportive approach that the Non-public School is offering to the Student.

VII. DECISON

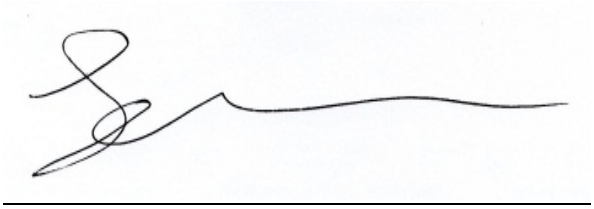
1. The Respondent denied the Student a FAPE when it did not provide the Student with an IEP reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of other needs resulting from disability, because the IEP in all its revisions since July 23, 2011, lacked measurable annual goals designed to enable the Student to be involved in and make progress in the general education curriculum (many goals were not measurable nor were they annual) and lacked a BIP necessary to help the Student meet appropriate goals and to make academic and functional progress. The IEP revisions included accurate statements of the Student's present levels of academic achievement and functional performance. The Student was placed in a full-time special education setting. While the IEP was not revised following each of the Student's hospitalizations, there is no requirement for that to occur and no evidence the Petitioner ever requested a meeting and was denied. The Petitioner has not shown that IEP team meetings lacked the minimally required team members and, even if the teams had, it was a procedural flaw and nothing more.
2. The Respondent denied the Student a FAPE when it failed to provide special education and related services in conformity with IEP since July 23, 2011. Approximately one third of the behavior support services the Student required were not provided and no specialized instruction was provided during the 2012-2013 school year when the Student was not taught by a licensed special education teacher.
3. The Respondent failed to ensure the OT assessment requested by the Petitioner was provided or that a written notice of its refusal to conduct the assessment was provided.

4. The Petitioner did not show the Respondent changed the Student's educational placement when it assigned to School C for the 2013-2014 school year, following the closure of School B.

VIII. ORDER

1. The Student will be placed at the Non-public School at public expense no later than October 21, 2013. The Student will remain at the Non-public School until academic achievement is at or near the grade level for age, or until the Non-public School will no longer enroll the Student, in which case the Student's IEP team must consider the Student's educational placement. If the Student scores at the basic level on the DC-CAS in reading and math, academic achievement is at or near grade level.
2. Transportation will be provided to the Student to and from the Non-public School at public expense.
3. Nothing in this order is to be construed to require a specific level of performance above being involved in and making meaningful progress in the general education curriculum (passing based on sufficient demonstrated knowledge of grade level academic standards).
4. The Respondent will cause an OT assessment of the Student to be completed no later than November 8, 2013. The OT assessment may be completed at the school the Student is attending at the time, or at another location convenient in time and place to the Parent but not during the Student's school hours if another location is used. The Respondent will convene the IEP team to meet to review the OT assessment report within ten calendar days following completion of the assessment report.

IT IS SO ORDERED.



Date: October 4, 2013

Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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