

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

Student Hearing Office  
810 First Street, N.E., Suite 2001  
Washington, DC 20002

OSSE  
Student Hearing Office  
March 18, 2014

<p><b>STUDENT<sup>1</sup>,</b> <b>By and through PARENT,</b></p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p><b>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</b></p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer:</p> <p>Charles M. Carron</p> <p style="text-align: center;">:</p>
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**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND**

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed January 17, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent #1, against Respondent, District of Columbia Public Schools (“DCPS”).

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

On January 24, 2014 the undersigned was appointed as the Impartial Hearing Officer.

On January 27, 2014, Respondent filed its timely Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on January 31, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on February 16, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on February 17, 2014 and will conclude on April 2, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on February 21, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by March 4, 2014 and that the Due Process Hearing (“DPH”) would be held on March 11 and 12, 2014, as confirmed in the Prehearing Conference Summary and Order (“PHO”) issued by the undersigned on February 21, 2014.

No motions were filed by either party and the DPH was held on March 11, 2014 from 9:37 a.m. to 2:27 p.m., continuing on March 12, 2014 from 9:35 a.m. to 1:20 p.m. at the Student Hearing Office, 810 First Street, NE, Suite 2001<sup>2</sup>, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, the following documentary exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1, P-7, P-8, P-10, P-11 and P-14 through P-25;

Respondent’s Exhibits: R-1 through R-7; and

Hearing Officer’s Exhibits: HO-1 through HO-8.

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<sup>2</sup> On March 11, 2014, the DPH was held in Room 2007; on March 12, 2014, in Room 2006.

The following documentary exhibits were admitted into evidence over Respondent's objection for the reasons stated on the record at the DPH: P-2 through P-6, P-9, P-12 and P-13.

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

Parent #1 (Petitioner);

Parent #2;

Educational Advocate, who was qualified, over Respondent's objection, as an expert in special education programming and services;

Tutor, who testified as a fact witness;

Assistant Educational Director of the Non-Public School; and

Licensed Psychologist, who was qualified as an expert in school psychology and clinical psychology.

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

General Education Teacher #2 and

DCPS Social Worker.

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

## **II. JURISDICTION**

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

### III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the DPC are as follows:

The Student is male, Current Age, and attends Current Grade at a public school (the “Attending School”). The Student has been determined to be eligible for special education and related services as a child with a disability, Other Health Impairment (“OHI”), under the IDEA.

Petitioner claims that Respondent has denied the Student a FAPE by failing to place the Student at a school that can implement his Individualized Education Program (“IEP”), by failing to provide all of the specialized instruction and related services required by his IEP, and by failing to update his Behavior Intervention Plan (“BIP”).

On July 23, 2013, Hearing Officer Melanie Byrd Chisholm issued an HOD in Case No. 2013-0264 involving the same parties as the instant case (the “prior HOD”). HO-8. The claims in that case were nearly identical to the claims in the instant case.

The prior HOD found, *inter alia*, that Petitioner had not established that the Student’s then-current BIP, dated April 24, 2012 (P-13), was inappropriate. HO-8-14.

The prior HOD ordered Respondent to revise the Student’s IEP to provide “five hours per week of specialized instruction outside of the general education environment for ELA [English Language Arts], five hours per week of specialized instruction within the general education environment for math, and five hours per week of specialized instruction in a combination of within and outside of the general education environment for social studies and science.” HO-8-21.

The prior HOD found that the Attending School was capable of providing the Student a FAPE (HO-8-12 and -13) and that the Non-Public School was not an appropriate placement for the Student (HO-8-20). Neither party appealed the prior HOD.

The undersigned informed counsel at the PHC and at the DPH that no relitigation of the issues resolved in Case No. 2013-0264 would be permitted.

Accordingly, the undersigned adopts all of the findings and conclusions in the prior HOD are though they were stipulated by the parties. To do otherwise would violate the principle of *res judicata*. See, e.g., *Theodore v. District of Columbia*, 772 F. Supp. 2d 287 (D.D.C. 2011).

As a result, the undersigned has limited his fact-finding and conclusions of law to events occurring subsequent to the implementation of the prior HOD, referring to events, documents and testimony predating the prior DPC only in the context of determining whether changes in the Student's circumstances subsequently rendered the Student's placement, location of services, and/or his BIP, inappropriate.

#### **IV. ISSUES**

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

- (a) Is the Attending School an inappropriate location of services ("LOS") for the Student for School Year ("SY") 2013-2014 because it cannot provide specialized instruction outside the general education setting as required by the Student's IEP?
- (b) Did Respondent deny the Student a FAPE during SY 2013-

2014 to date by failing to provide all of the specialized instruction required by his IEP?<sup>3</sup>

(c) Did Respondent's failure, following the December 2013 meeting of the Student's IEP Team, to amend the Student's IEP deny the Student a FAPE by retaining his current placement rather than revising his placement to a more restrictive setting?

(d) Did Respondent's failure, following the December 2013 meeting of the Student's IEP Team, to update or revise the Student's BIP deny the Student a FAPE?

## **V. RELIEF REQUESTED**

Petitioner requests the following relief:<sup>4</sup>

- (a) a finding that Respondent has denied the Student a FAPE;
- (b) an Order that Respondent fund placement of the Student at the Non-Public School, with transportation;
- (c) an Order that Respondent fund an independent Functional Behavioral Assessment ("FBA");
- (d) an Order that Respondent revise the Student's IEP to include revised social emotional goals, specialized instruction in an outside

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<sup>3</sup> At the PHC, as confirmed in the PHO that neither party challenged, this issue included an allegation that Respondent failed to provide all of the related services in the Student's IEP. However, the parties stipulated at the beginning of the DPH that all related services had been provided; only the provision of the Student's specialized instruction was in dispute.

<sup>4</sup> In the DPC, Petitioner also requested attorney's fees and costs, which only a court can award.

general education setting for all academic courses, placement in a full time outside general education therapeutic setting, and an updated BIP; and

(e) compensatory education, comprising placement at the Non-Public School as well as 112 hours of independent tutoring, primarily in reading.

## **VI. FINDINGS OF FACT**

### Facts Related to Jurisdiction

1. The Student is a male, Current Age (P-1-1<sup>5</sup>) and resides in the District of Columbia. Stipulation of counsel on the record at the DPH.

2. The Student has been determined to be eligible for specialized instruction and related services under the IDEA as a child with OHI (P-1-1) due to Attention Deficit Hyperactivity Disorder (“ADHD”) (Testimony of Petitioner; Testimony of Licensed Psychologist).

### The Student’s Behavior in SY 2011-2012

3. The “Updated FBA” dated March 20, 2012, prepared by Licensed Psychologist and Psychology Associate (the “March 2012 FBA”) noted the following behaviors of concern during a March 6, 2012 observation:

1) When the teacher asked [the Student] to move his desk back to the group, he remained in his seat, away from the other students for about two minutes.

2) When the teacher ask[ed] the students to copy the notes from the board, [the Student] did not comply until reminded by the teacher.

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<sup>5</sup> When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

- 3) When another student was confused and stood up in front of the class, [the Student] laughed to himself.
- 4) [The Student] poked the girl next to him with his pencil and laughed to himself.
- 5) [The Student] fidgeted often as he was working with [Special Education Teacher #1].

P-12-4 and -5.

4. The March 2012 FBA noted the following behaviors of concern during a March 9, 2012 observation:

- 1) [The Student] copied a noise of a student after the student was reprimanded for making the same sound.
- 2) As [the Student] was working, he sang and danced in his seat.
- 3) [The Student] talked quietly with a student while the teacher was doing guided instruction.
- 5) [sic] [The Student] got up several times to change his pencil.
- 6) [sic] [The Student] stood up and looked out of the window every time someone honked their horn outside.
- 7) [sic] [The Student] shouted out nonsense answers to the teacher's questions.
- 8) [sic] [The Student] did not watch the teacher's direct instruction on the board.
- 9) [sic] [The Student] danced around the room inappropriately during multiplication tables and chanting.
- 10) [sic] [The Student] grabbed another [sic] girl's paper and threw it.

P-12-8.

5. According to the March 2012 FBA, Special Education Teacher #1 reported that the Student displayed the following behaviors about two or three times per week for 15 to 20 minutes: being openly defiant, leaving the classroom, becoming destructive to classroom materials, or becoming aggressive to peers, and that he sometimes kicked tables, tore objects from the walls or made physical or verbal threats. P-12-8.

6. According to the March 2012 FBA, Special Education Teacher #1 reported that the Student's non-complaint behaviors were most likely to occur when he was in the

classroom and during “specials,” as a means of gaining control, but that after “cooling off,” he could rejoin the instruction. *Id.*

7. According to the March 2012 FBA, the Student’s then general education teacher reported that the Student yelled out in class, picked on others, refused to comply or follow directions, talked back to the teacher, and “constantly” fought with others, and that these behaviors occurred daily and throughout the day, and she thought he did these behaviors for attention. P-12-9.

8. According to the March 2012 FBA, the Student was primarily motivated by adult approval, competition and peer approval. *Id.*

#### The Student’s Behavior in SY 2012-2013

9. As of June 2013 (P-9-1), General Education Teacher #1 reported that the Student was very talkative in class, disruptive, threw things at the aide, was verbally abusive, and had inconsistent relationships with peers (sometimes fighting with them). P-9-13.

10. As of June 2013, Special Education Teacher #1 reported that the Student was disruptive in class. P-9-1 and -14.

11. During SY 2012-2013, the Student was verbally aggressive, and had problems with self-control and impulsiveness. Testimony of Educational Advocate.

12. During SY 2012-2013, Petitioner and Parent #2 received telephone calls two to four times per week from teachers and the principal of the Attending School advising them that the Student was out of control, verbally abusing peers, running, jumping, and

being chased by teachers up and down the hallway. Testimony of Petitioner, testimony of Parent #2.

The Student's August 6, 2013 IEP

13. The Student's IEP was revised on August 6, 2013 to comply with the prior HOD. P-1-11, P-2-1, HO-8-21.

14. The Student's August 6, 2013 IEP contained goals in Mathematics, Reading and Written Expression. P-1-4 through -6.

15. The Student's August 6, 2013 IEP noted that his inability to "self regulate" and manage impulsivity, physical aggression and defiance continued to have an adverse impact on his ability to access the general education curriculum, and the IEP contained associated social-emotional goals. P-1-9.

16. The Student's August 6, 2013 IEP provided the following specialized instruction: five hours per week in Mathematics in the general education setting, 2.5 hours per week in Social Studies and Science combined in the general education setting; five hours per week in Reading in the outside general education setting; and 2.5 hours per week in Social Studies and Science combined in the outside general education setting. P-1-10.

17. For the reasons explained in Section III, *supra*, the August 6, 2013 IEP, including the placement of the Student at the Attending School, and the Student's then-current BIP, are deemed by the undersigned to be appropriate and deemed conceded to be appropriate by the parties as of the beginning of SY 2013-2014.

Implementation of the Student's IEP During SY 2013-2014 to the Date of the DPH

18. Petitioner testified that the Student informed her he was not receiving any “pull-out” services, *i.e.*, specialized instruction in the outside of general education setting. Testimony of Petitioner. The undersigned gives this testimony no weight both because it is hearsay and because the Student's accounts of other events at school were inaccurate.<sup>6</sup>

19. Educational Advocate testified that Tutor and Petitioner had advised her that the Student was not receiving any specialized instruction in the outside of general education setting. Testimony of Educational Advocate. The undersigned gives this testimony by Educational Advocate no weight because it is “double hearsay,” inasmuch as both the Tutor and Petitioner were repeating to Educational Advocate what the Student had told them (Testimony of Tutor, testimony of Petitioner), and because the Student is not an accurate historian (*see*, Finding of Fact 18 n.6, *supra*).

20. According to notes taken by Educational Advocate at the December 4, 2013 IEP Team meeting, Special Education Teacher #2 stated that she was providing some specialized instruction in the general education setting rather than outside general education. P-7-1 and -3; *accord*, testimony of Petitioner.

21. Respondent's notes of that same meeting indicate that Special Education Teacher #2 stated that the Student was “getting service over and beyond the services. He

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<sup>6</sup> For example, Petitioner testified the Student told her there were 20 to 23 students in his general education class; however, General Education Teacher #2 credibly testified that there are 16. By way of another example, Petitioner testified that the Student told her he never was “pulled out” of the general education classroom for specialized instruction, and that Special Education Teacher #2 instructed him only in the general education classroom at a table set off by a partition. However, General Education Teacher #2 credibly testified that Special Education Teacher #2 “pulled out” the Student daily, giving the specific times of day and subjects of the Student's “pull out” instruction. *See*, Finding of Fact 24, *infra*.

receives – individual, group over the amount of assigned.” R-7-2. Respondent’s notes do not indicate whether the specialized instruction was provided in the general education setting or in the outside general education setting. R-7.

22. Petitioner testified that at the Resolution Session Meeting on January 31, 2014, General Education Teacher #2 stated that he included ELA<sup>7</sup> in his general education classroom. Testimony of Petitioner.

23. The apparent discrepancies in testimony regarding whether the Student received his specialized instruction in the general education setting or in the outside general education setting were explained fully by General Education Teacher #2. Attending School has an “inclusion model,”<sup>8</sup> which means that special education teachers “push into” the general education classroom; however, special education teachers also “pull out” students for specialized instruction outside the general education classroom as needed. Testimony of General Education Teacher #2.

24. During SY 2013-2014, the Student has received the following specialized instruction daily:

- (a) ELA in the general education setting: 120 minutes, with General Education Teacher #2 providing 60 minutes and Special

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<sup>7</sup> ELA comprises Reading and Written Expression. Colloquy of counsel at the DPH.

<sup>8</sup> Apparently Petitioner and her representatives misunderstood “inclusion model” to mean that all instruction is provided in the general education classroom. Apparently neither Petitioner nor Parent #2 has visited Attending School for a complete school day to observe the flow of the Student in and out of the general education classroom. Educational Advocate had requested the opportunity to observe the Student in the classroom but Respondent’s policies precluded such an observation. Testimony of Educational Advocate.

Education Teacher #2 providing “push in” services during the remaining 60 minutes of that time;

(b) ELA, combined with Social Studies and Science, in the outside of general education setting: 65 minutes, provided by Special Education Teacher #2;

(c) Mathematics in the outside of general education setting: 25 minutes, provided by Special Education Teacher #2;

(d) Mathematics in the general education setting: 90 minutes, with General Education Teacher #2 providing 45 minutes and Special Education Teacher #2 providing “push in” services during the remaining 45 minutes of that time; and

(e) Social Studies and Science in the general education setting: 60 minutes, with General Education Teacher #2 providing 30 minutes and Special Education Teacher #2 providing “push in” services during the remaining 30 minutes of that time.

*Id.*

25. Thus, each day the Student has received the following specialized instruction in the general education setting: 60 minutes of ELA, 45 minutes of Mathematics and 30 minutes combined of Social Studies and Science; and each day the Student has received the following specialized instruction in the outside of general education setting: 65 minutes of ELA combined with Social Studies and Science, and 25 minutes of Mathematics.

26. Multiplying by five school days per week, the Student has received the following hours of specialized instruction each week: in the general education setting, five hours of ELA, 3.75 hours of Mathematics, and 2.5 hours combined of Social Studies and Science, for a total of 11.25 hours; and in the outside of general education setting, 5.4 hours of ELA combined with Social Studies and Science, and 2.1 hours of Mathematics for a total of 7.5 hours.

27. The Student's IEP requires 7.5 hours per week of specialized instruction in the general education setting, five of which are to be in Mathematics. P-1. The Student has received 11.25 hours per week of specialized instruction in the general education setting, 3.75 of which have been in Mathematics. Finding of Fact 26, *supra*.

28. The Student's IEP requires 7.5 hours per week of specialized instruction in the outside of general education setting, five of which are to be in Reading. P-1. The Student has received those 7.5 hours, with slightly more than five in ELA combined with Social Studies and Science. *Id.*

29. The remaining 2.1 hours per week of specialized instruction in the outside of general education setting have been in Mathematics (*Id.*), which, combined with the 3.75 hours of specialized instruction in Mathematics in the general education setting, equals 5.85 hours per week, exceeding the five hours per week of specialized instruction in Mathematics that the Student's IEP calls for. P-1.

30. Based upon all of the evidence in the record, the undersigned finds that the Student received more hours of specialized instruction in the general education setting than required by his IEP, and all of the hours of specialized instruction in the outside of general education setting required by his IEP. The undersigned finds that any deviation

with regard to the allocation of hours of specialized instruction among subjects/courses (e.g. some of the ELA time being spent on Written Expression rather than Reading, or a fraction of an hour per week being spent on Social Studies or Science rather than Mathematics) was not material.

### Tutoring and Homework

31. Since the beginning of SY 2013-2014, the Student has received approximately five hours per week of one-on-one tutoring in a variety of subjects, provided by Tutor.

Testimony of Tutor.

32. The Student has demonstrated better organization skills as a result of the tutoring. *Id.*

33. The Student rarely if ever brought any homework home from school. Testimony of Petitioner, testimony of Tutor, testimony of General Education Teacher #2, testimony of Parent #2.

34. Parent #2 called the principal of Attending School, who told Parent #2 that the school was giving the Student homework, but he was not bringing it home. Testimony of Parent #2.

35. The Student frequently left his homework in the school hallway or hid it. Testimony of General Education Teacher #2.

36. Arrangements were made to have the Student's sibling bring the Student's homework home (Testimony of Petitioner, testimony of General Education Teacher #2), but that arrangement either never was implemented (Testimony of Petitioner) or it was discontinued (Testimony of General Education Teacher #2).

37. When the Student did not turn in his homework, his teachers had him do the homework in class. Testimony of General Education Teacher #2.

38. Tutor called the Attending School and requested that the Student be permitted to bring home his books, but the person with whom Tutor spoke said the request would have to come from the Student's parent. Testimony of Tutor.

39. Tutor never called or emailed General Education Teacher #2. Testimony of General Education Teacher #2.

40. Tutor testified to complaints the Student had about school; however, the undersigned has given no weight to this hearsay testimony. *See*, Finding of Fact 18 n.6, *supra*.

41. Tutor also provided her opinion on whether the Student could succeed in the general education setting; however, she had not been qualified as an expert, so the undersigned has disregarded this opinion testimony.

#### The Student's Academic Progress From August 2013 through December 3, 2013

42. According to Tutor, the Student has made very slow progress in reading and now recognizes the need to read directions before attempting to solve problems; however, he still cannot comprehend sentences. Testimony of Tutor.

43. As of November 1, 2013, the Student had made no progress toward mastery of his ability to use phonics and letter sounds correspondences to decode words when supported with illustrations. R-2-3 and -4.

44. As of November 1, 2013, the Student orally, with teacher prompts and cues, was demonstrating the ability to sequence important events in text but showed no measurable improvements in formulating sentences and using punctuation. R-2-4 and -5.

45. Based upon testing, the Student was reading at level “C” in August 2013 (P-1-5) and level “I” by November 1, 2013 (R-2-3), but had regressed to “G” by December 4, 2013 (Testimony of Petitioner, testimony of Educational Advocate).

46. General Education Teacher #2 testified that as of December 3, 2013, the Student had made no progress in reading since August 2013. Testimony of General Education Teacher #2.

47. As of November 1, 2013, the Student was demonstrating very slow progress toward mastery of his ability to round numbers (R-2-1), and had demonstrated no progress multiplying a four digit number by a two digit number (R-2-2).

48. According to General Education Teacher #2, the Student had “basic” math skills at the beginning of SY 2013-2014, and as of December his skills were “emerging.”  
*Id.*

49. Based upon all of the record evidence, the undersigned finds that the Student made no substantial progress from August 2013 through December 3, 2013.

#### The Student’s Behavior From August 2013 through December 3, 2013

50. The second week of SY 2013-2014, the Student was suspended. Testimony of Petitioner.

51. The Student continued to be verbally aggressive, and continued to have problems with self-control and impulsiveness that he had in SY 2012-2013. Testimony of Educational Advocate.

52. The Student continued to act out and to be destructive to school materials as he had in SY 2012-2013. Testimony of Petitioner.

53. The Student continued to make verbal threats to peers as he had in SY 2012-2013, and in SY 2013-2014 he also made verbal threats to teachers. *Id.*

54. Parent #2 received telephone calls two or three times per week from teachers and the principal of Attending School advising him that the Student was out of control, verbally abusing teachers and peers, running, jumping, and being chased by teachers up and down the hallway, and that he should come to the school to talk to the Student. Testimony of Parent #2.

55. Parent #2 went to the school and sometimes was successful calming the Student so that he could return to class, but on four occasions, Parent #2 had to take the Student out of school for the rest of the day. *Id.*, testimony of Petitioner.

56. Petitioner testified that she received at least 10 telephone calls from General Education Teacher #2 about the Student's behavior from September through November, 2013. Testimony of Petitioner.

57. General Education Teacher #2 testified that as of December 2013, the Student's behavior was inconsistent—some days “on,” some days “off,” depending on his mood, and that at the beginning of December he had an “escalation” based upon something a peer said to him. Testimony of General Education Teacher #2.

58. As of December 2013, the Student sometimes talked to adults in inappropriate ways, for example, saying to teachers that they could not tell him what to do. *Id.*

59. Special Education Teacher #2 responded to the Student's repeated inappropriate behavior by talking to the Student, explaining that as a child he cannot talk to adults that way. *Id.*

60. According to the Student's Mid-Advisory Progress Report dated December 9, 2013 and signed by General Education Teacher #2 (the "Mid-Advisory"), the Student did not make effective use of time at all, demonstrated appropriate behavior inconsistently, followed established rules and guidelines inconsistently, was beginning to "walk out again," and needed to control his attitude and mood swings. P-23-1 and -2.

61. According to the Student's School Progress Report dated December 6, 2013, and signed by Special Education Teacher #2 (the "Progress Report"), the Student had not been able to demonstrate consistent positive behavior in or out of class. P-24-1.

62. Based upon all of the record evidence, the undersigned finds that the Student's behavior had deteriorated from the end of SY 2012-2013 to December 4, 2013, in particular, he had become verbally abusive to teachers.

63. Based upon the entire record, the undersigned finds that the Student's behavior distracted him and his peers from instruction, his eloping from the classroom reduced his hours of instruction, and his failure to take home his homework required him to spend classroom time doing his homework—all of which resulted in his failure to make substantial academic progress.

The December 4, 2013 IEP Team Meeting

64. At the December 4, 2013 meeting of the Student's IEP Team, Petitioner raised concerns about (a) a teacher calling the Student "dirty," (b) the Student not receiving the hours of specialized instruction provided in his IEP, and (c) the Student's behavior.

P-7-1.

65. The IEP Team discussed the Review of Independent Evaluation by Certified School Psychologist dated September 17, 2013 (R-6). P-7-2, testimony of Educational Advocate.

66. In that Review, Certified School Psychologist noted that the Student had no absences, suspensions or disciplinary referrals from the beginning of SY 2013-2014 to September 17, 2013. R-6-9.

67. Certified School Psychologist had observed the Student in two classes on September 16 and 17, 2013, and had found him generally engaged although he had to be redirected frequently. R-6-10.

68. DCPS Social Worker noted that the Student was struggling to gain control of his impulsive inclinations, was distracted, and his ADHD affected his ability to get his work done. P-7-2.

69. DCPS Social Worker had noted in the IEP Progress Report for Reporting Period I (August 26 through November 1, 2013) that when the Student was frustrated in the classroom, he had difficulty utilizing positive coping skills. R-2-6.

70. Special Education Teacher #2 stated that the Student was non-compliant and off-task and did not follow explicit instructions such as writing his name on a paper (P-7-1) and that sometimes "he is literally 'flying from the rafters'" (P-7-3).

71. Special Education Teacher #2 stated that the Student was not completing all of his assignments in class, not doing well academically, and performing below grade level. Testimony of Educational Advocate.

72. General Education Teacher #2 stated that the Student was distracted, off task, and being disruptive. *Id.*

73. General Education Teacher #2 stated that the Student sometimes left the classroom without permission, that he had to chase the Student up the stairs, and that he would warn the Student that if he left the classroom the door would lock behind him and he would not be allowed back in the classroom. Testimony of Petitioner, testimony of General Education Teacher #2.

74. Educational Advocate requested a “full time IEP” for the Student, *i.e.*, that he attend a special education school with no non-disabled peers. Testimony of Educational Advocate.

75. Educational Advocate stated that the Student was not receiving “pull out” services, *i.e.*, specialized instruction in the outside of general education setting. *Id.*

76. Special Education Teacher #2 stated that she “pulled” the Student aside in the general education classroom. *Id.*

77. Educational Advocate stated that the Student was reading at the “G” level, *i.e.*, mid-first grade, and had not done well on a recent assessment. *Id.*

78. Although the Mid-Advisory was not prepared until after the December 4, 2013 meeting, General Education Teacher #2 attended that meeting. R-7-1. Accordingly, the undersigned finds that the information in the Mid-Advisory was available to the IEP Team and either was, or should have been, discussed.

79. Similarly, although the Progress Report was not prepared until after the December 4, 2013 meeting, Special Education Teacher #2 attended that meeting. R-7-1. Accordingly, the undersigned finds that the information in the Progress Report was available to the IEP Team and either was, or should have been, discussed.

80. Respondent acknowledged that the Student's BIP needed to be amended; Special Education Coordinator ("SEC") stated at the December 4, 2014 meeting that Respondent would update the Student's BIP and IEP based upon the information discussed at the meeting. P-7-3, testimony of Petitioner; testimony of Educational Advocate.

81. DCPS Social Worker testified that she asked Petitioner and Educational Advocate what they wanted to change in the BIP and received no response. Testimony of DCPS Social Worker.

82. DCPS Social Worker testified that the concerns about the Student's behavior discussed at the meeting were sufficient to justify an updated FBA; however, Respondent took no initiative to seek parental consent for an FBA or to conduct an FBA because Respondent was awaiting feedback on the draft BIP from Petitioner and Educational Advocate. *Id.*

83. Petitioner and Educational Advocate testified that Respondent promised to provide the BIP to them immediately after the meeting and to allow them to review the draft and to make revisions or suggestions in writing. Testimony of Petitioner, testimony of Educational Advocate.

84. According to Respondent's notes, the Student's BIP and IEP were to be updated at the annual review of the Student's IEP on March 10, 2014.<sup>9</sup> R-7-3.

85. Based upon the entire record, the undersigned finds that the parties intended the Student's BIP to be revised on an interim basis shortly after the December 4, 2013 meeting, and for the BIP to be discussed and updated again in March 2014.

86. Respondent's notes of the December 4, 2013 IEP Team meeting state that the Parent (Petitioner herein) was "okay with service being provided by [the Attending School]." R-7-3; *accord*, testimony of General Education Teacher #2. Petitioner denied having said this, testifying that she had stated the Student needed a full time special education school because the Attending School could not handle him and could not provide even the "pull out" services required by his IEP. Testimony of Petitioner. For the reasons discussion in Section VIII, *infra*, the undersigned cannot resolve this discrepancy in testimony. Because this discrepancy is not material to the resolution of the issues in this case, the undersigned makes no finding as to whether Petitioner stated she agreed with the "service" being provided by Attending School.

#### Appropriateness of the Student's BIP as of December 4, 2014

87. Based upon the entire record, the undersigned finds that the Student's BIP dated April 24, 2012 (P-13) that had been found sufficient as of July 23, 2013 in the prior

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<sup>9</sup> The March 10, 2014 meeting apparently was rescheduled to March 12, 2014, and then postponed due to the scheduling of the second day of the DPH on that day. Colloquy of counsel at the DPH.

HOD (HO-8) no longer was appropriate as of December 4, 2014.<sup>10</sup> Specifically, the BIP was not reasonably calculated to provide the Student educational benefit based upon the deterioration in his behavior (Finding of Fact 62), his failure or refusal to bring home his homework (Finding of Fact 33) and his failure to make substantial academic progress (Finding of Fact 49).

88. The undersigned finds that the response of Special Education Teacher #2 to the Student's frequent and escalating misbehavior—talking sternly to him—although well intentioned and perhaps effective for other children, did not effectively modify the Student's behavior.

89. The undersigned finds that an appropriate BIP would have modified the Student's behavior substantially, leading to fewer and less severe disruptions in the classroom, increased compliance with taking homework home and completing it there, and his remaining in the classroom rather than eloping, all of which would have enabled the student effectively to access the general education curriculum.

#### The Student's January 31, 2014 Draft IEP

90. A draft revision of the Student's IEP was prepared on January 31, 2014.<sup>11</sup>

P-15.

91. The Student's January 31, 2014 draft IEP contains goals in Mathematics,

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<sup>10</sup> In the DPC, at the PHC and in the PHO, Petitioner did not assert that Respondent should have revised the Student's BIP *prior to* the December 4, 2014 IEP Team meeting; the only issue regarding the BIP is whether Respondent failed to update or revise the BIP after that meeting.

<sup>11</sup> The draft had not been made final or implemented as of the date of the DPH. Colloquy of counsel at the DPH.

Reading and Written Expression. P-15-3 through -6.

92. The Student's January 31, 2014 draft IEP notes that his inability to regulate and monitor his behavior, his impulsivity, his distractibility, and his inattentiveness continue to have an adverse impact on his ability to perform to his full potential. P-15-8. The draft IEP contains social-emotional goals. P-15-8.

93. The Student's January 31, 2014 draft IEP continued the same specialized instruction as in the Student's August 6, 2013 IEP. P-15-9, P-1-10.

94. The Student's January 31, 2014 draft IEP continued the same behavioral support services as in the Student's August 6, 2013 IEP. *Id.*

95. The Student's January 31, 2014 draft IEP includes the following language concerning positive behavioral interventions and supports:

Due to [the Student's] behavioral issues that present in the classroom (attention deficit, impulsivity, inappropriate pragmatic skills), the following strategies have been implemented[:] 1.) [The Student] is to remain seated, and ask for permission to leave his seat during instructional time in the class room. [The Student] is assigned a seat, and his teacher directs him when it is time for transition during instructional time. 2.) The teacher engages [the Student] verbally with the curriculum, uses proximity control, and reinforces pos[i]tive behavior when he appropriately raises his hand with verbal praise, and warns him using a behavior chart when he speaks out without permission. 3.) The teacher engages [the Student] verbally during instruction time, uses proximity control, redirects the student back to task verbally redirects back to task with visual signs [sic] in the classroom. 4.) The teacher uses proximity control, redirects the student to uses [sic] words to solve problems, and use courtesy behaviors when interacting with his peers. [5].) [The Student] is to raise his hand and wait to be called on when he wants to speak in class during instructional time. [6].) [The Student] is to listen to directions by looking at the speaker, follow class rules, and directions within one of [sic] two requests[s]. [7].) [The Student is] to use appropriate language when interacting with peers and adults, keep his hands to himself, and use appropriate words to have his wants, feelings and needs met[.]

P-15-2.

Events Subsequent to the December 4, 2013 IEP Team Meeting<sup>12</sup>

96. By the middle of SY 2013-2014 (apparently the beginning of the winter break in December 2013), the Student's reading had progressed to level "I" which means he was emerging from the first grade level; he was able to associate new words with pictures and words he knew; and he was building word fluency and comprehension, "growing" seven percent each of the two nine-week sessions. Testimony of General Education Teacher #2.

97. However, although the Student knew what he wanted to say, he still had difficulty writing sentences. *Id.*

98. According to Parent #2, the Student can read words but does not know what they mean, even road signs. Testimony of Parent #2.

99. According to Petitioner, the Student is "on the same level" in reading as he was in SY 2012-2013; he knows more words but cannot comprehend the main idea in a paragraph. Testimony of Petitioner.

100. According to Petitioner, the Student is on a second grade level in spelling. *Id.*

101. As of the date of the DPH, the Student's math skills have improved to the point that he understands addition, subtraction and multiplication; he can do two-digit by two-digit multiplication; he can multiply fractions; he can subtract five-digit numbers; and he can do all kinds of addition. Testimony of General Education Teacher #2.

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<sup>12</sup> The Student's academic progress and behavior, and Respondent's actions or inactions, after the filing of the DPC on January 17, 2014 are relevant only to the remedy for a denial of FAPE occurring prior to that date.

102. According to Petitioner, the Student does “better” in Mathematics and retains information problems “a little better,” but he cannot do word problems. Testimony of Petitioner.

103. As of January 24, 2014 the Student (a) had mastered one of the academic goals in his IEP, (b) had made no progress on two of his academic goals, and (c) had made progress on the rest of his academic goals. R-3.

104. As of January 14, 2014, Petitioner had not received a revised BIP. P-8-1.

105. A draft revised BIP was provided to Petitioner on January 29, 2014. P-10<sup>13</sup>, P-11-1.

106. At the Resolution Session Meeting on January 31, 2014, Respondent’s representatives solicited comments on the draft BIP from Petitioner’s representatives, who declined to discuss the BIP. Testimony of DCPS Social Worker.

107. On February 20, 2014, the Student was suspended for one day for “getting in a teacher’s face” and threatening her. P-25-1, testimony of General Education Teacher #2.

108. On February 21, 2014, via email to Special Education Coordinator, Petitioner objected to the January 28, 2014 draft BIP on the basis that (a) it was not based upon a[n updated] FBA, (b) the “replacement behaviors” were vague and non-specific, (c) the proposed intervention strategies were non-specific, (d) the rewards were not on a specific schedule, (e) no inquiry had been conducted to determine whether the proposed consequences would cause more problematic behavior, and (f) no provision was made for

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<sup>13</sup> P-10 is the first page of what apparently was a multi-page document. *Cf.*, R-4.

teaching the Student positive replacement behaviors. P-11-1. Petitioner requested an FBA. *Id.*

109. DCPS Social Worker testified that she did not receive a copy of Petitioner's February 21, 2014 email with the objections to the draft BIP. Testimony of DCPS Social Worker.

110. Another draft revised BIP was prepared on February 28, 2014, the first page of which is identical to the January 28, 2014 draft BIP except for the date. R-4, P-10.

111. DCPS Social Worker testified that Respondent has not implemented the proposed revised FBA because she has not discussed it with Petitioner or Petitioner's counsel. Testimony of DCPS Social Worker.

112. On February 28, 2014, the Student cursed at adults and was defiant and disrespectful. Testimony of General Education Teacher #2.

113. On February 28, 2014, General Education Teacher #2 sent a text message to Petitioner asking her to call him because the Student was having a "rough day." P-16.

114. Parent #2 still is receiving telephone calls from the Attending School to come to the school to pick up the Student because of his behavior. Testimony of Parent #2.

115. Petitioner testified that she received at least one phone call in January 2014 and at least three phone calls in February 2014 from General Education Teacher #2 about the Student's behavior. Testimony of Petitioner.

116. General Education Teacher #2 testified that, except for February 28, 2014, he had not called Petitioner or Parent #2 for two or three months prior to the DPH. Testimony of General Education Teacher #2.

117. General Education Teacher #2 testified that other teachers have asked him for Petitioner's telephone number because they had problems with the Student that they wanted to discuss with Petitioner. *Id.*

118. Based upon all of the record evidence, the undersigned finds that Respondent's failure to revise the Student's BIP during the three-month period following the December 4, 2013 IEP Team meeting resulted in educational harm because the Student's deteriorating behavior interfered with his access to the general education curriculum to a substantial extent.

119. The undersigned finds that Petitioner's comments on the draft BIP (Finding of Fact 108, *supra*), received by Special Education Coordinator three weeks after Petitioner's representative received the revised draft, constituted the "input" that DCPS Social Worker was seeking, and that Respondent bears responsibility for Special Education Coordinator's failure to forward those comments to DCPS Social Worker.

120. The undersigned finds that despite the actions, delays and/or inactions by Petitioner and her representatives, Respondent could have updated the Student's BIP between December 4, 2013 and the beginning of the January 2014 school term. Specifically, the IEP Team could have solicited Petitioner's consent for an updated FBA of the Student, conducted that FBA, and then reconvened the Student's IEP Team to revise the Student's BIP as appropriate—whether or not Petitioner or her representatives provided comments or concurrence.

121. Based upon the entire record, and experience as an Impartial Hearing Officer, the undersigned finds that if at the December 4, 2013 IEP Team meeting, Respondent had solicited Petitioner's consent for an FBA, the FBA could have been

conducted and a revised BIP based upon the FBA could have been developed and implemented at the resumption of classes in January 2014 after the winter break.

### Compensatory Education

122. Educational Advocate testified that the Student should be placed at a full-time special education school and also receive 112 hours of one-on-one tutoring to remediate the alleged denial of FAPE. Testimony of Educational Advocate.

123. Educational Advocate recommended a full-time special education school because a “therapeutic environment” would “extinguish” some of the Student’s behaviors, and psychologists or counselors there could address his behavioral concerns. *Id.*

124. Educational Advocate had not been qualified as an expert in child psychology or behavior; accordingly, the undersigned has assigned no weight to her testimony regarding placement of the Student at a different school to control his behavior.

125. Educational Advocate recommended tutoring in conjunction with placement at a full-time special education school because tutoring has allowed the Student to make academic progress and would increase his rate of progress. *Id.*

126. Specifically, Educational Advocate asserted that with these compensatory measures, the Student could make a year and a half’s growth in reading in one year. *Id.*

127. Based upon the entire record, particularly the testimony of Tutor, the undersigned concludes that tutoring is an appropriate way of compensating the Student for the educational harm resulting from the failure to have a revised BIP in place since January 2014, provided that the tutoring includes working with the Student on his

homework so that his instructional time at school is not diminished by the need to do his homework there.

### The Non-Public School

128. The Non-Public School is a private, full time special education school in Springfield, Virginia, where all of the students have disabilities and IEPs. Testimony of Assistant Educational Director of the Non-Public School (“Assistant Educational Director”).

129. The Non-Public School is a therapeutic program for students with learning and emotional difficulties, including behavior management plans and access during the school day to clinical psychologists and behavioral technicians. *Id.*

130. The majority of the students at the Non-Public School have Emotional Disturbance as their primary disability classification (*Id.*), which is not the Student’s disability classification of the Student (Finding of Fact 2).

131. Tuition at the Non-Public School is approximately \$239 per day, plus approximately \$109 per psychological session. Testimony of Assistant Educational Director.

### Ability of the Attending School to Provide FAPE to the Student

132. Based upon all of the record evidence, the undersigned finds that the Attending School is capable of providing FAPE to the Student if the Student’s BIP is revised and consistently implemented.

## **VII. BURDEN OF PROOF**

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

## **VIII. CREDIBILITY**

The undersigned found Licensed Psychologist not credible. The report of her July 2013 evaluation of the Student recommended that he receive specialized instruction outside the general education environment in his core subjects, and she testified to that effect in Case No. 2013-0264. In the instant case, she testified that the Student now requires a full-time special education school. Upon questioning by the undersigned, Licensed Psychologist testified that she changed her recommendation based upon the following: (a) the Student's progress reports and report card, (b) the comment by Special Education Teacher #2 that on occasion the Student was "flying from the rafters"; (c) a clinically significant score identifying "problem area's (sic) in externalizing behaviors and having to[o] much energy" on the Ohio Mental Health Consumer Outcomes System Ohio Youth Problem Functioning Series administered May 24, 2013 (P-1-8); (d) the Student's academic regression over the summer of 2013; and (e) a statement in the Student's August 6, 2013 IEP that the Student's "inability to self-regulate and manage impulsivity, along with physical aggression, defiance continues to impact [him] from accessing the general education curriculum" (*Id.*). On cross examination, Licensed

Psychologist admitted that she had not seen the Student since July 2013 and that the above-quoted statement from the Student's August 6, 2013 IEP was attributed to her own July 2013 evaluation (which obviously was not "new" information). In response to a question by the undersigned, Licensed Psychologist admitted that between July and December, 2013, the Student continued to have the same behavior problems as when she evaluated him in July 2013. The lack of clinical basis for her dramatic change in recommendations and her defensive tone led the undersigned to conclude that she was not testifying truthfully. Rather, she knew what relief Petitioner wanted, and it appears that she molded her testimony to fit. Accordingly, the undersigned has not relied on her testimony at all in deciding the issues in the instant case, and has made no reference to her testimony in the Findings of Fact (Section VI *supra*).

The testimony of Petitioner and General Education Teacher #2 conflicted on several points—how often General Education Teacher #2 had phoned Petitioner about the Student's behavior, and whether Petitioner had agreed at the December 4, 2013 IEP Team meeting that she was satisfied with the services the Attending School was providing.

Petitioner, who seeks costly non-public school placement of the Student at Respondent's expense, therefore had a motive to exaggerate how many calls she was receiving and to deny that she had agreed with the services the Student was receiving at the Attending School. However, her testimony was consistent, and her tone of voice and mannerisms were not defensive even under aggressive questioning by the undersigned. Accordingly, the undersigned does not find that she knowingly falsified her testimony.

General Education Teacher #2, who conveyed a high level of confidence and pride in his experience as a teacher and his ability to manage his students' behavior, therefore had a motive to understate how many calls he was making to Petitioner about the Student's behavior. However, he had no apparent motive to misrepresent what Petitioner said at the December 4, 2013 meeting. His testimony was consistent, and his tone of voice was not defensive even under aggressive questioning by the undersigned.<sup>14</sup> Accordingly, the undersigned does not find that he knowingly falsified his testimony.

In short, although the discrepancies in the testimony of Petitioner and General Education Teacher #2 are irreconcilable and disturbing, the undersigned concludes that they both testified honestly to the best of their recollection. In any event, the testimony in conflict was not material to deciding the issues in the instant case.

The undersigned found the remaining witnesses to be credible, to the extent of their first hand knowledge.

## **IX. CONCLUSIONS OF LAW**

### Purpose of the IDEA

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

§1400(d)(1); *accord*, DCMR §5-E3000.1.

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<sup>14</sup> General Education Teacher #2 testified by telephone, so his mannerisms could not be observed.

## FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

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

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

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

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

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

## Implementation of the IEP

3. If an appropriate IEP is developed, but the Local Educational Agency (“LEA”) fails to implement the IEP fully, the failure constitutes a denial of FAPE only if the failure is “material.” *See, e.g., Banks v. District of Columbia*, 720 F. Supp. 2d 83 (D.D.C. 2010).

4. In the instant case, because any failure to implement the Student’s IEP was not material (Finding of Fact 30), the failure did not constitute a denial of FAPE.

## Authority of a Hearing Officer to Order Prospective Placement in a Private School<sup>15</sup>

5. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401

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<sup>15</sup> Respondent refers to private schools as “non-public schools.”

F.3d 516, 521-24 (D.C. Cir. 2005). In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005).

6. The IDEA provides that an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the agency made a FAPE available to the child. 20 U.S.C. §1412(a)(10)(C)(i); *accord*, DCMR §5-E3018.1.

7. As noted by the U.S. Court of Appeals for the District of Columbia Circuit:

If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.

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

#### Least Restrictive Environment

8. IDEA requires that, to the maximum extent appropriate, children with disabilities are education with children who are not disabled. 34 C.F.R. §300.114(a)(2)(i).

[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A); *accord*, 34 C.F.R. §300.114(a)(2)(ii) and DCMR §5-E3011.

#### Appropriateness of the Attending School and the Non-Public School

9. A determination of the appropriateness of a special education placement requires consideration of at least the following factors: (a) the nature and severity of the student's disability; (b) the student's specialized educational needs; (c) the link between those needs and the services offered by the school/program; (d) the cost of the placement if it is a non-public school; and (e) the extent to which the placement represents the Least Restrictive Environment ("LRE") for the Student. *Branham v. District of Columbia, supra.*

10. When DCPS makes a special education placement, the following order or priority applies among placements that are appropriate for the student:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.

DC ST §38-2561.02(c). Although this order of priority is not binding upon a Hearing Officer, a Hearing Officer is not precluded from taking these priorities into consideration in ordering a placement.

11. Parental choice does not supersede the LRE requirement. *See* 71 Fed. Reg. 46541 (August 14, 2006).

12. District of Columbia law adds another element to LRE, that the placement must be "based upon consideration of the proximity of the placement to the student's place of residence." DC ST §38-2561.01(6)(C). Implementing regulations in the District

of Columbia require that the child be educated in the school that the child would attend if not disabled unless the IEP requires some other arrangement (DCMR §5-E3013.1); and if a placement outside the LEA is required, the placement must be in the program that meets the requirements of the child's IEP that is closest to the child's residence (DMCR §5-E3013.7).

13. In the instant case, the record evidence does not establish that the Student's disability or his educational needs require a special school or a placement outside the LEA or the District of Columbia; accordingly, a general education DCPS school with the availability of "push in" and "pull out" specialized instruction, such as Attending School, is his LRE and a full time special education school, such as Non-Public School, is not his LRE.<sup>16</sup>

#### Location of Services

14. When determining the school that a student with an IEP should attend—sometimes referred to as the Location of Services ("LOS")—the LEA must select a setting that is able to *substantially* implement the IEP. This concept recently was explained in lengthy but useful detail by the United States District Court for the District of Columbia:

Because the plaintiffs are entitled to reimbursement for F.J.'s education at Accotink only if the defendant has deprived F.J. of a FAPE, the Court begins its analysis with that assessment. See 20 U.S.C. §§1412(a)(10)(C)(ii). In order to provide a student with a FAPE, the student's education must be "provided in conformity with the IEP" developed for her, and therefore, the educational agency must place the student in a setting that is capable of fulfilling the student's IEP. See *id.*

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<sup>16</sup> Moreover, the location of the Non-Public School in Springfield, Virginia, not proximate to the Student's residence, also renders it not the Student's LRE.

§1401(9); 34 C.F.R. §300.116 (2012) (providing that a child’s educational placement “[i]s based on the child’s IEP”); *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (citing § 1401(9)).

As an initial matter, the parties disagree as to the standard the Court must apply in assessing the plaintiffs’ claim that DCPS deprived F.J. of a FAPE. Citing *Hinson v. Merritt Educational Center*, 579 F. Supp. 2d 89 (D.D.C. 2008), the plaintiffs assert that “the Hearing Officer incorrectly imported the standard applicable to claims of a failure to implement an IEP,” and assessed whether Ballou was able to substantially implement the IEP, whereas “the proper standard . . . is whether or not it can implement the IEP as written.” Pls.’ Mem. at 8–9. The defendant, on the other hand, urges the Court to apply the same standard used by the hearing officer and to require the plaintiffs to show “more than a de minimis failure to implement all elements of [the] IEP” in order to succeed on their claim. Def.’s Mem. at 13–14 (quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007)). The Court agrees with the defendant.

The plaintiffs have misread *Hinson v. Merritt Educational Center* as requiring that a student’s placement conform to the IEP “as written.” See Pls.’ Mem. at 7–9; Pls.’ Opp’n at 5–6. To be sure, in *Hinson*, another member of this Court held that the appropriateness of the student’s placement must be evaluated with reference to the IEP “as written,” *Hinson* 579 F. Supp. 2d at 104, but the plaintiffs’ interpretation of this phrase is incorrect when the Court’s words are placed in context. In *Hinson*, the plaintiff argued that the school designated by DCPS was an inappropriate placement because it could not meet the plaintiff’s proposed standards for her child’s IEP. *Id.* The Court’s conclusion that “to show that placement is inappropriate, plaintiff must show that [the school] is unable to implement the IEP as written,” therefore refers to evaluating a placement from the standpoint of how the IEP is actually drafted, and not from the perspective of how a parent believes the IEP ought to be written. *Id.* *Hinson* does not, as the plaintiffs suggest, support the proposition that a proposed placement is appropriate only if the school is capable of fulfilling every requirement of the IEP exactly as written. The plaintiffs cite to no other authority to support their argument that a placement must be able to satisfy all of the requirements of the IEP “as written,” and the Court’s research has found none.

The standard used by the hearing officer and pressed by the District is the standard formulated by the Fifth Circuit for failure-to-implement claims in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), and widely adopted by other federal courts. See, e.g., *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d

811, 821–22 (9th Cir. 2007); *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 187 (3d Cir. 2006); *Garmany v. Dist. of Columbia*, \_\_\_ F. Supp. 2d \_\_\_, \_\_\_, 2013 WL 1291289, at \*3 (D.D.C. 2013); *Savoy*, 844 F. Supp. 2d at 31. This standard requires that a plaintiff “must show more than a de minimis failure to implement all elements of [the student’s] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP” in order to prevail on a failure-to-implement claim. *Catalan*, 478 F. Supp. 2d at 75 (quoting *Bobby R.*, 200 F.3d at 349), *aff’d sub nom. E.C. ex rel. Catalan v. Dist. of Columbia*, No. 07-7070, 2007 U.S. App. LEXIS 21928 (D.C. Cir. Sept. 11, 2007). Courts applying this 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.” *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citations omitted).

The defendant’s view finds support in both logic and case law. In order to provide a FAPE, after an IEP is designed, the District “must . . . implement the IEP, which includes placement in a school that can fulfill the requirements set forth in the IEP.” *Pabo*, 573 F. Supp. 2d at 53 (citing §1401(9)); see also *Savoy*, 844 F. Supp. 2d at 31 (characterizing the plaintiff’s claims that the school to which the student was assigned after he aged out of his prior placement “failed to provide the number of hours and types of services required by [the student’s] IEP” as failure-to-implement claims). At bottom, an allegation that a student’s placement is not appropriate because the school cannot implement one or more provisions of that student’s IEP is a claim that the educational authority has failed to properly implement the student’s IEP by placing the student at a school which is capable of implementing it. The fact that the plaintiffs’ claim here is a “prospective” challenge, which arises “at [a] different point[] in the process of implementing and developing an IEP” from a claim which alleges that a school has failed to implement a student’s IEP during the student’s attendance there, Pls.’ Opp’n at 5, is a distinction without a difference. The Court sees no logical reason to require perfect compliance with a student’s IEP in determining an appropriate placement when, as the plaintiffs concede, imperfect compliance with the IEP would be permissible once the student begins attending the school. See *id.* Accordingly, because placing a student in an appropriate educational setting is an element of implementing the IEP, the Court will assess the appropriateness of F.J.’s proposed placement at Ballou by determining whether Ballou was capable of substantially implementing F.J.’s IEP.

The plaintiffs contend that F.J.’s placement at Ballou is inappropriate because Ballou is incapable of providing F.J. with the thirty-one hours of specialized instruction required by her IEP and does not have the necessary staff to provide adequate instruction in Spanish and physical

education, both required for F.J. to receive a diploma. Pls.’ Mem. at 8–10. Shamele Straughter, Ballou’s Special Education Coordinator, confirmed that students in Ballou’s program are in school for a total of 32.5 hours each week but receive only 28.25 hours per week of actual instruction after breaks are subtracted. See A.R. at 363–64. Ms. Straughter testified, however, that “when individuals create IEPs that are 32 hours, what they are actually trying to do is ensure that [the students] do not engage with their non-disabled peers during non-instructional time[,] which include[s] lunch and transition.” A.R. at 359–60. The plaintiffs attempt to discredit this testimony by arguing that such an interpretation is inconsistent with the generally understood meaning of “instruction” and noting that Ms. Straughter was not part of the Team that developed F.J.’s IEP, see Pls.’ Opp’n at 2–3, but they failed to offer any evidence that contradicted Ms. Straughter’s hearing testimony. In any event, even if F.J.’s IEP is read as calling for precisely thirty-one hours of instructional time, the difference between thirty-one and a little over twenty-eight does not constitute a material deviation from the requirements of the IEP. Admittedly, a deviation in hours of instruction can, in certain circumstances, be a substantial deviation resulting in the denial of a FAPE. See, e.g., *Van Duyn*, 502 F.3d at 823 (finding that a 50% deprivation of hours was material); see also *Heffernan*, 642 F.3d at 481 (finding that providing seven and a half to ten hours of the required fifteen hours, in combination with the school’s failure to use the teaching method specified in the IEP, was material). However, a comparison of the hours that would have been provided by Ballou with the hours mandated by the IEP reveals that the deviation alleged here is relatively slight, as Ballou was capable of providing F.J. with 91% of the hours of specialized instruction required by her IEP. Other members of this Court have reached the same conclusion when faced with similar deviations. See, e.g., *Savoy*, 844 F. Supp. 2d at 34 (finding that a difference of less than one hour per week was not material); *Catalan*, 478 F. Supp. 2d at 76 (holding that failure to receive “a handful of sessions” of therapy and therapist’s shortening of several other sessions was not material). The situation here is in stark contrast to the losses in *Sumter* (50–67% of the hours required by the IEP per week) and *Van Duyn* (50% of hours required by the IEP). Moreover, the Court notes that the private placement selected for F.J. (*Accotink*), provides similar hours as Ballou—30.5 hours of school per week and 28.33 hours of actual instruction. A.R. at 187–88. While not dispositive, the fact that F.J. received less than the number of specialized instruction hours called for by the IEP at *Accotink* and approximately the same number of hours she would have received at Ballou, is proof that the discrepancy in hours Ballou would have provided is not material.

*Johnson v. District of Columbia*, \_\_\_ F.2d \_\_\_ (Civ. No. 12-0352 (RBW), August 27, 2013).

15. In the instant case, because Attending School can substantially implement the Student's IEP (Finding of Fact 30), it is an appropriate LOS.

#### Behavior Intervention Plan

16. IDEA requires a child's IEP Team, in developing the IEP of a child whose behavior impedes his learning or that of others, to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. §1414(d)(3)(B)(i).

17. In the instant case, the Student's behavior impeded his learning to a greater extent than it had when his current BIP was found to be appropriate in the prior HOD (Finding of Fact 62); accordingly, the IEP Team was required to update or revise his BIP.

18. Although the IEP Team recognized the need to revise the Student's BIP (Finding of Fact 80), the Team did not conduct a current FBA to inform revision of the Student's BIP (Finding of Fact 82) and did not follow up with due diligence to revise the BIP (Findings of Fact 105, 106, 109-111, 119 and 120), resulting in continuing educational harm to the Student (Finding of Fact 118).

19. Respondent, as the LEA, "has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE." *Schoenbach v. District of Columbia*, 46 IDELR 67, 106 LRP 46342 (D.D.C. 2006). IEP decisions are not made by majority vote. Rather:

If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

*Id.*, citing 34 C.F.R. Part 300, Appendix A -- Notice of Interpretations, 64 Fed. Reg. 12,473 (1999). DCPS Social Worker's repeated testimony that Respondent could not move forward without "authorization" from Petitioner or Petitioner's representatives therefore is not accurate. While parental consent is required for evaluations, including FBAs (20 U.S.C. §1414(a)(1)(D); *see also*, 34 C.F.R. § 300.300(a)(1)(i)), the LEA must make reasonable efforts to obtain such consent (*see*, 34 C.F.R. §300.300(a)(1)(iii)). In the instant case, Respondent made no such efforts. Testimony of DCPS Social Worker.

20. Based upon the entire record, the undersigned finds that Respondent failed to revise the Student's BIP in a timely manner and that failure denied the Student a FAPE.

#### Compensatory Education

21. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, *supra* at 521-24 (D.C. Cir. 2005). That relief may include compensatory award of prospective services:

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

*Id.*

22. In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, *supra*. Educational programs, including compensatory education, must be qualitative, fact-intensive, and "above all tailored to the unique needs of the disabled student." *Id.*

23. Mechanical calculation of the number of hours of compensatory education (a “cookie-cutter approach”) is not permissible. *Reid v. District of Columbia, supra*. Rather, compensatory awards “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” *Id.* Awards compensating past violations must “rely on individual assessments.” *Id.*

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

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

24. The Hearing Officer must base a compensatory education award on evidence regarding the student’s “specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.” *Id.*

25. In the instant case, the evidence supports an award of one-on-one tutoring, at the same number of hours per week that the Student has been receiving, until the end of SY 2013-2014. Finding of Fact 127.

### Summary

26. The Attending School is an appropriate LOS for the Student for SY 2013-2014 because it can provide specialized instruction outside the general education setting as required by the Student’s IEP.

27. Respondent did not deny the Student a FAPE during SY 2013-2014 to date by failing to provide all of the specialized instruction required by his IEP because Respondent provided substantially all of the specialized instruction required by the Student's IEP.

28. Respondent's failure, following the December 2013 meeting of the Student's IEP Team, to amend the Student's IEP to a more restrictive setting did not deny the Student a FAPE because his current placement is his LRE.

29. Respondent's failure, following the December 2013 meeting of the Student's IEP Team, to update or revise the Student's BIP denied the Student a FAPE because his deteriorating behavior substantially interfered with his ability to access the general education curriculum.

## **X. ORDER**

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

1. No later than March 19, 2014, Petitioner or Petitioner's representative shall send an email to Special Education Coordinator, with a copy to DCPS Social Worker if her email address is known to Petitioner or Petitioner's counsel. The email shall state all of the dates during the week of March 24, 2014, and the times on those dates, that are acceptable to Petitioner for a 90-minute meeting of the Student's Individualized Education Program ("IEP") Team to revise the Student's current Behavior Intervention Plan ("BIP") on an interim basis, thus creating the Student's "Interim BIP" to be effective until an updated Functional Behavioral Assessment ("FBA") is completed. The email

shall indicate Petitioner's order of preference among those dates and times. The email shall specify the email address to which Respondent's response scheduling the IEP Team meeting should be sent.

2. No later than the business day after receiving the email referred to in Paragraph 1 above, or no later March 21, 2014 if Petitioner fails to send the email referred to in Paragraph 1 above, Respondent shall respond to the email address provided in the email, scheduling the IEP Team meeting. Respondent shall attempt to schedule the meeting for one of the dates and times proposed in Petitioner's email. However, the IEP Team meeting must be scheduled to take place no later than March 28, 2014 unless Petitioner and Respondent mutually agree to a later date. The unavailability of Petitioner or her representative(s) shall not be cause to postpone or reschedule the IEP Team meeting absent mutual agreement. Petitioner shall attach to the email a consent form for the FBA and provide the name and email address of the representative of Respondent to whom the signed consent form should be returned.

3. Within one business day of receiving Respondent's email referred to in Paragraph 2 above, Petitioner or her representative shall return the signed FBA consent form via email. Petitioner or her representative shall deliver the original of the signed FBA consent form to Respondent at the IEP Team meeting convened pursuant to Paragraph 2 above.

4. At the IEP Team meeting convened pursuant to Paragraph 2 above, the Student's Interim BIP shall be developed, without awaiting any post-meeting exchange of drafts or comments. However, Respondent may type the Interim BIP after the meeting and provide copies to all IEP Team members for proofreading and any corrections.

5. The Interim BIP shall include a description of specific incentives or tangible rewards for the Student engaging in desired behaviors, including but not limited to the following: (a) bringing home his homework, (b) bringing home whatever books may be required to complete the homework, (c) completing his homework, (d) bringing his homework to school and turning it in, and (e) refraining from eloping from the classroom or engaging in verbal aggression or other disruptive behavior for a specified period of time, for example, an entire school day or an entire school week. If the incentive or reward is a food treat, the Interim BIP shall specify the food treat or treats. If the incentive or reward is time on a classroom computer, the Interim BIP shall specify the duration of that time, when the computer time will be offered (in other words, how soon after the Student has engaged in the behavior earning the incentive or reward and during what part of the school day), and what sites or programs the Student is permitted to access. If the incentive or reward is time engaging in an activity of the Student's choice, the Interim BIP shall specify the acceptable activities, their duration, and when they will be offered.

6. The Interim BIP shall include a description of specific consequences for the Student engaging in inappropriate behaviors, including but not limited to the following: (a) failing to bring home his homework, (b) failing to bring home whatever books may be required to complete his homework, (c) failing to complete his homework, (d) failing to bring his homework to school and turn it in, (e) eloping from the classroom, or (f) engaging in verbal aggression or other disruptive behavior.

7. The Interim BIP shall include specific directions to teachers and staff as to how and when they should communicate with Petitioner and/or Parent #2 when the Student engages in desired or inappropriate behaviors.

8. The Interim BIP shall be implemented within two school days of the IEP Team meeting at which it is developed.

9. No later than five school days after receiving via email the signed FBA consent form referred to in Paragraph 3 above, Respondent either shall (a) begin to conduct an FBA of the Student, or (b) issue to Petitioner an Individualized Educational Evaluation (“IEE”) letter authorizing Petitioner to obtain an independent FBA of the Student.

10. If Respondent conducts the FBA referred to in Paragraph 9 above, Respondent shall complete the FBA within 15 school days of receipt of the signed consent form via email. Within two school days of completing the FBA, Respondent shall provide a copy to Petitioner via email to the email address stated in Petitioner’s email referred to in Paragraph 1 above.

11. If Respondent authorizes an IEE rather than conducting the FBA, Petitioner shall make reasonable efforts to have the IEE completed no later than 20 school days after receiving the IEE letter. Within two business days of receiving the FBA, Petitioner shall cause a copy of the FBA to be emailed to Special Education Coordinator or such other representative of Respondent as Respondent may indicate when issuing the IEE letter.

12. No later than ten school days after conducting the FBA or receiving the FBA conducted pursuant to the IEE letter, Respondent shall reconvene the Student’s IEP Team, with all necessary members, including Petitioner, to (a) review the FBA,

(b) discuss the Student's behavior since the implementation of the Interim BIP, (c) review and revise the Student's Interim BIP as appropriate, and (d) review and revise the Student's social-emotional goals in his IEP as appropriate. The meeting shall be scheduled for 90 minutes.

13. If at the meeting referred to in Paragraph 12 above, the IEP Team determines that the Student's Interim BIP and/or IEP should be revised, the revisions shall be made at the meeting, without awaiting any post-meeting exchange of drafts or comments. However, Respondent may type the revised BIP and/or IEP after the meeting and provide copies to all IEP Team members for proofreading and any corrections.

14. If the Student's Interim BIP and/or IEP are revised at the meeting referred to in Paragraph 12 above, the revisions shall be implemented within five school days of the meeting.

15. If the Student's Interim BIP and/or IEP are revised as a result of the meeting referred to in Paragraph 12 above, then Respondent shall, between 20 and 30 school days after the revisions are implemented, reconvene the IEP Team to determine the effectiveness of the revisions and make further revisions if appropriate. This Paragraph shall apply even if the Student is attending summer school or has had a change in Location of Services.

16. As used herein, "school days" includes days of summer school if the Student is attending summer school.

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

18. As compensatory education for the denial of FAPE to the Student that occurred from the beginning of the school term in January 2014 after the winter break when a revised BIP should have been implemented until the implementation of the Interim BIP, Respondent shall provide and fund the following services: From March 24, 2014 until the end of School Year 2013-2014, Respondent shall fund five hours per week of independent one-on-one tutoring of the Student in all academic subjects, with at least half of the time dedicated to improving the Student's reading skills. To ensure the effectiveness of the tutoring, from March 24, 2014 until the end of School Year 2013-2014, Respondent shall provide Petitioner, via email (or via U.S. mail if Respondent does not have Petitioner's personal email address), all of the Student's homework assignments so that the Student's tutor and/or Petitioner or Parent #2 can work with the Student on completing the homework. If the homework is emailed, it shall be emailed no later than 4:00 p.m. on the day the homework is handed out in the Student's classroom. Posting the homework on a web site that is accessible to Petitioner, Parent #2 and the Student's tutor without sharing of passwords among them shall be considered equivalent to delivery to Petitioner via email. If the homework is mailed to Petitioner via U.S. mail, it shall be placed in the U.S. mail at least three business days in advance of the date the homework is handed out in the Student's classroom. If and when the Student is bringing home his homework reliably, Petitioner shall so advise Special Education Coordinator, after which Respondent may discontinue providing the homework directly to Petitioner.

19. Any delay caused by Petitioner or Petitioner's representatives (such as absence or failure to attend a meeting, or failure to return the signed FBA consent form or respond to scheduling requests within one business day) shall extend Respondent's deadlines

under this Order by the same number of days, except that the scheduling of the IEP Team meeting referred to in paragraphs 1 through 3 above, and the development of the Student's Interim BIP referred to in Paragraph 4 above shall proceed whether or not Petitioner or her representatives communicate their available dates and times for the IEP Team meeting to develop the Student's Interim BIP or attend that meeting.

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

Dated this 17<sup>th</sup> day of March, 2014.



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Charles Carron  
Impartial Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

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