OSSE
Student Hearing Office
July 08, 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: July 8, 2013

Hearing Officer: Jim Mortenson

Case No:

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on April 29, 2013. The Petitioner and Respondent are both represented by counsel. The Undersigned was appointed to hear this matter on April 30, 2013.

A response to the complaint was filed on May 8, 2013. A prehearing conference was convened on May 8, 2013, and a prehearing order was issued on that date. A resolution meeting was held on May 15, 2013, and resulted in no agreements.

The Respondent shared and filed disclosures, without the required prehearing brief, on May 20, 2013. The Petitioner shared and filed disclosures, with a prehearing brief that did not describe what each disclosed document would prove, on May 23, 2013.

[1] All names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix B which is to be removed prior to public dissemination.

The hearing was convened at 9:35 a.m. on Friday, May 31, 2013, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing was scheduled to close at 2:00 p.m. and, because the parties took more time than expected, the hearing was recessed at 2:30 p.m. following the completion of the Petitioner's case. The Respondent considered making a request for continuance of the hearing and the Petitioner noted her objection to a continuance. The Undersigned offered the parties the opportunity to reconvene the hearing, via telephone, within the 45 day hearing timeline with certain conditions, including the submission of direct examination and answers of the witness in writing in advance of the hearing.[2] The parties agreed to this accommodation and the hearing was scheduled to reconvene, via telephone, at 3:30 p.m. on Thursday, June 6, 2013, to permit the Respondent to present its case.

The Respondent submitted the written direct examination and answers to the questions on June 3, 2013. On June 5, 2013, the Petitioner filed a motion for a continuance and subsequently withdrew that motion when the hearing reconvened on June 6, 2013. The Petitioner filed a motion on June 6, 2013, to exclude the Respondent's written direct examination, because a majority of the questions were leading. The motion was granted with regard to the seven leading questions because the rules for the additional hearing time had been proposed by the Undersigned and agreed to by the parties and a failure to adhere to those rules and standard legal practice to ensure a fair and efficient process would not be rewarded or ignored. The answers to

[2] Due process hearings under IDEA operated under very short and strict timelines (the hearing must be held and a decision issued within 45 days of the start of the hearing timeline, which can occur up to 30 days from the date the complaint was filed). Thus, changing schedules, such as adding days to an already planned hearing, can be challenging for all involved. Further, because of the careful planning that goes into scheduling at the prehearing stage, a continuance for good cause is not taken lightly because of the scrutiny applied by the State Education Agency.

the seven leading questions were stricken from the record.[3] The case then concluded as the Petitioner had no cross-examination for the Respondent's witness. The Petitioner was to file a written closing statement by the close of business on Friday, June 7, 2013, and did not file her statement until after the close of business (6:00 p.m.) which resulted in the arguments being untimely and unconsidered.

The Petitioner had filed a subsequent complaint appealing a manifestation determination made on May 17, 2013, which was assigned to another hearing officer. The Respondent moved for the two cases to be consolidated on June 12, 2013. The motion was not considered by the Undersigned as it was untimely (it came after the five hearing day disclosure deadline, and was also filed after the conclusion of the hearing in the present matter).[4]

The due date for this Hearing Officer's Determination (HOD) is July 13, 2013. This HOD is issued on July 8, 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.

[3] The Respondent demanded that it be permitted to ask its witness questions while convened on the phone since it had wanted to do so when the rescheduling was discussed at the prior hearing on May 31, 2013. It also asserted that the Petitioner's objections to the form of the Respondent's questions was a distraction and a waste of time. The Respondent's "motion" was denied.

[4] It is a standard practice for hearing officers for the OSSE to have motions to consolidate considered and determined by the first assigned hearing officer.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

1. Whether the Respondent denied the Student a free appropriate public education (FAPE) because it has not offered or provided the Student with an individualized education program (IEP) reasonably calculated to enable the Student to be involved in or make progress in the general education curriculum, or meet each of the Student's other educational needs that result from her disability, when the IEP proposed January 23, 2013, lacks: a statement of the Student's present levels of academic achievement and functional performance; annual goals; sufficient specialized instruction outside of the general education setting; transportation; and sufficient behavioral supports?[5]

2. Whether the Respondent denied the Student a FAPE because it failed to respond to the Petitioner's March 28, 2013, request for a functional behavioral assessment (FBA) and behavior intervention plan (BIP)?

The Petitioner is seeking a revision to the IEP to include: an increase in specialized instruction outside of the general education setting to a full-time environment devoted to working with children with emotional behavioral disorders; 90 minutes per week of counseling; behavioral goals and goals to put the Student on grade level; and special transportation. She is also seeking a reevaluation consisting of: a comprehensive psychological assessment including cognitive, academic, and clinical components; a functional behavioral assessment; and a speech and language assessment. She is seeking compensatory education for the Student to remedy stagnant grades and a lack of progress, consisting of tutoring in writing and placement in a non-public special education day school. The Petitioner is also, or alternatively, seeking prospective placement of the Student at a non-public special education day school.

The Respondent denied the Student a FAPE when it did not offer or provide her with an IEP reasonably calculated to enable her to be involved in and make progress in the general education curriculum, or meet each of her other educational needs that result from her disability, when the IEP proposed January 23, 2013: lacked a statement of her present levels of academic

[5] An additional portion of this issue, concerning goals and services to address speech and language needs, was withdrawn by the Petitioner at hearing.

achievement and functional performance (the statement in the January 2013 IEP was identical to the prior IEP of March 2012); the annual goals were extended from an expected completion in March 2013 for almost a year to January 2014; included an unexplained reduction in the level of specialized instruction, despite the lack of sufficient progress toward goals; and the BIP was removed, despite continued behavioral issues. The Respondent also failed to respond to the Petitioner's request for a reevaluation of the Student in February 2013. This is a procedural violation that did not result in a denial of FAPE.

IV. EVIDENCE

Three witnesses testified at the hearing, two for the Petitioner and one for the Respondent. The Petitioner's witnesses were the Petitioner herself (P) and the Student (S). The Respondent's witness was the Special Education Coordinator from the Student's Middle School (T.S.). All of the witnesses testified credibly.

18 of the Petitioner's 33 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. The Respondent offered none of its five disclosures into evidence.

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. 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 year old child with a disability who moved from a District of Columbia Charter School to the attending school during the second term of the 2012-2013 school year.[6] The Respondent was responsible for the provision of special education services for the Student at the Charter School.[7] The Student began at the attending school repeating the sixth grade and was moved during the year to the seventh grade.[8]
2. The Student was initially evaluated for eligibility for special education and related services by the Respondent at the Charter School, during sixth grade, following a referral on January 27, 2012, and the evaluation was completed in March 2012.[9] The Student has no diagnosed disability, but was found eligible for special education and related services under the definition of emotional disturbance and an IEP was written on March 28, 2012.[10]
3. The Student was exhibiting disruptive behaviors and difficulties regulating her emotions during her sixth grade year at the charter school when she was 11 years of age, and a functional behavioral assessment (FBA) was conducted in November 2011.[11] The Student's behaviors included: talking back to adults; refusing to follow directions; walking and running away from adults; yelling at other students; walking out of the classroom without permission; cursing at adults; and yelling at teachers and administrators when given instructions.[12] Triggers for the behavior varied, and included: irritation or annoyance by a classmate;

[6] Testimony (T) of P, T of T.S.
[7] P 12.
[8] P 16, T of P, T of T.S.
[9] P 12.
[10] P 12, P 17. (P did testify that the Student was currently taking medication, but no details of what medications or specifically for what condition are in the record.)
[11] P 12.
[12] P 12.

redirection; tone of voice; and not getting something she wants.[13] The Student is eager to receive attention and support from adults, and is extremely sensitive to feeling rejected or ignored.[14] She takes redirection very personally.[15] The Student engages in oppositional and defiant behavior in order to avoid feeling rejected by adults and appears to be very sensitive to any indication that adults may be disapproving or critical of her.[16] She may react defensively in order to gain a sense of control over her interactions with adults.[17]

4. When the Student was initially evaluated in 2012, she was reported to always have performed on grade level, but became more disruptive and defiant during sixth grade, which impacted her educational performance because she was often engaging in off-task behaviors or was out of class to address the off-task behaviors and therefore missing instructional time.[18] The Student was often late to class, had failing grades, displayed an lack of effort, had poor focus during instruction, displayed off-task behaviors, was not completing class work and homework assignments.[19] She did perform on the proficient level in Reading and Math on the 2010 DC-CAS.[20] On the NWEA reading test, the Student's performance dropped from the 63rd percentile in the fall of 2011 to the 2nd percentile in the winter of 2012.[21] Teacher redirection was resulting in escalating behaviors to defiance or aggression.[22] The Student also began to show frustration when she was required to apply skills based on taught concepts she had missed.[23] The Student sought recognition for positive actions, and did not

[13] P 12.
[14] P 12.
[15] P 12.
[16] P 12.
[17] P 12.
[18] P 12.
[19] P 12.
[20] P 12.
[21] P 12.
[22] P 12.
[23] P 12.

want to be corrected for negative actions.[24] She also reported feeling hopeless.[25] The Student's general academic skills in math, reading and writing were at the expected level when compared to her same-age peers.[26] The Student's behaviors were having an adverse effect on her educational performance as evidenced by her deteriorating grades.[27] She demonstrated significant difficulties with aggression and emotional dis-regulation, suggesting overall maladjustment in the educational environment, requiring ongoing remediation and accommodations to address targeted areas of behavior difficulties in order to meet her educational needs.[28]

5. The Student's initial IEP was developed on March 28, 2012, under the responsibility of the Respondent, at the charter school.[29] The IEP included the following statements of the Student's present levels of academic achievement and function performance:[30]

> [Student] completed WJIII testing on 02/09/2012 and scored in the average range in her broad math SS 100. Calculation skills were in the high average range SS 107. Math fluency skills were in the high average range SS 107, and applied problems skills were in the low average SS 95. Spring 2011, [Student] performed at the Proficient level on the mathematics test of the DCCAS and in Winter 2012, at the 33rd percentile on the NWEA MAP mathematics test.
>
> [Student] scored below grade level on problem-solving; per the WJIII scores, and showed weakness in patterns and algebra, measurement, and geometry; per NWEA and DCCAS data.
>
> [Student] completed WJIII reading on 02/09/2012 and scored in the average range in her broad reading SS 106. Letter/word identification was in the average range SS 107. Reading fluency was in the average SS 106, and passage comprehension was in the average SS 97. Spring 2011, [Student] performed at the Proficient level on the reading test of the DCCAS and in Winter 2012, at the 2nd percentile on the NWEA MAP reading test.
>
> [Student] showed weaknesses with vocabulary as evidenced by her verbal intelligence scores.

[24] P 12.
[25] P 12.
[26] P 12.
[27] P 12.
[28] P 12.
[29] P 17.
[30] P 17.

> [Student's] average ability impacts her ability to be successful with the general education curriculum. She requires specialized instruction.[31]
>
> [Student] has a history of defiant and disrespectful behavior in school. Behaviors of concern include yelling at peers, yelling at teachers, walking out of the classroom, refusing to comply with adult directives, talking back to adults, cursing, and becoming physically aggressive (i.e. throwing objects, pushing through doorways, slamming doors open or closed, and throwing chairs).
>
> [Student] needs to understand the connection between her choices and the consequences that can result. She needs to develop coping strategies when faced with frustration or anger.
>
> [Student's] behavior has had a significant impact on her performance in the general education setting.

The IEP included three academic goals, two math goals and one reading goal, which were to be achieved by March 27, 2013.[32] The services in the IEP included: specialized instruction in the general education setting for six hours per week; specialized instruction outside of the general education setting (specialized instruction in a small group setting) for two hours per week; behavioral support services (small group counseling) outside of the general education setting for 30 minutes per week; a classroom with minimal distractions; preferential seating; small group testing; flexible scheduling; tests administered over several days; tests administered at the best time of day for the Student; breaks between subtests; extended time on subtests; and breaks during subtests; and a BIP including: verbal praise and friendly interactions as much as possible; use of a calm and non-confrontational tone when speaking to the Student; providing a minute of wait-time to comply with instructions or directions; a mentoring relationship with a staff member to provide the Student with consistent and supportive interactions and opportunities to discuss frustrating situations in school as they arise; the use of a daily behavior chart connected with rewards and reinforcements for positive behaviors; the use of a daily check-in/check-out system; praise and positive

[31] This paragraph is not a typo. The IEP actually says this – twice - which raises all kinds of questions about the education the Student was to receive that are beyond the issues in this matter, and many that are beyond the authority of an IDEA hearing officer.
[32] P 12.

reinforcement for appropriate classroom behavior and on-time work completion; and consequences based on use of a token economy (e.g. loss of school money or losing school activities).[33]

6. The Student's BIP was revised on April 26, 2012, to remove the rewards and reinforcements of praise and positive reinforcement for appropriate classroom behavior and on-time work completion, replaced with earning recess with friends, and losing recess with friends as a consequence, and immediate dismissal from school for certain behaviors.[34]
7. On January 23, 2013, following the Student's transfer to the attending school, the IEP team met and reviewed the IEP.[35] The only revisions made to the IEP were the removal of the two hours of specialized instruction outside of the general education setting and the BIP.[36] No prior written notice explaining these changes was offered into evidence.
8. The Student's BIP was revised outside of the IEP team process following the January 23, 2013, IEP team meeting.[37]
9. For term 2 during the 2012-2013 school year, the Student earned the following grades: Math = B; English = B; and Health and Physical Education = B.[38] For term 3, the Student earned the following grades: Math = F; English = F; Science = C; and Problem Solving = C.[39]
10. The Student's defiant, avoidant, and disruptive behaviors continued and increased at the attending school.[40] The Principal of the attending school has advised the Petitioner that the

[33] P 17.
[34] P 18.
[35] P 16.
[36] P 16.
[37] T of P, P 19, P 20.
[38] P 21.
[39] P 21.
[40] P 9, P 10, P 11, P 23, P 24, T of P.

Student should not be at the attending school due to a lack of resources, and the Petitioner agrees.[41]

11. The Petitioner, through counsel, requested a comprehensive reevaluation of the Student , including a comprehensive psychological assessment and a FBA, because of the Student's ongoing academic difficulties, on February 26, 2013.[42] The Respondent never responded to the request until after the complaint in this matter was filed.[43]

12. The Student has been accepted at the Non-public School, a separated special education day school for children with emotional disabilities.[44] The Non-public School serves children from ages 11 to 21 who need help overcoming the challenges of emotional and behavioral obstacles in the classroom and in life.[45] The School's goal is to empower students to become independent, contributing members of society.[46] To accomplish this the experienced professional staff at the school, including certified special education teachers and licensed counselors and social workers, provide individualized academic instruction, small group teaching, individual and group counseling, behavior management, and crisis intervention and programming.[47] The School provides more intensive clinical services to address students' significant mental health needs and interventions to reduce incidents of violent and disruptive behavior, as well as a variety of creative approaches to engage students in the learning process and to increase their motivation to attend school on a consistent basis.[48]

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[41] T of P, P 24.
[42] P 7.
[43] T of P.
[44] T of P, P 26.
[45] P 26.
[46] P 26.
[47] P 26.
[48] P 26.

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. 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.

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). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See:* 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006). In the District of Columbia all available information

must be considered when making a determination about whether an IEP is reasonably calculated to provide these 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 his 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 his 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 supported by 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). The IEP team must, for a "child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]" 34 C.F.R. § 300.324(a)(2)(i).

3. A student's IEP must be reviewed periodically, but not less than annually, to determine whether the annual goals are being achieved and then revised, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum,

and other matters. 34 C.F.R. § 300.324(b). Federal regulations at 34 C.F.R. § 300.320 lists the required contents of 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;
> (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
> (3) A description of— (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
> (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
> (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —
> (i) To advance appropriately toward attaining the annual goals;
> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
> (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
> (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
> (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
> (A) The child cannot participate in the regular assessment; and
> (B) The particular alternate assessment selected is appropriate for the child; and
> (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

4. When the Student's IEP was reviewed and revised January 2013, ten months after its last revision, the statement of the Student's present levels of academic achievement and functional performance were not changed. By definition, this statement was then no longer of "present" levels. The goals were expected to be achieved by the end of March 2013, and so a change of the goals would not be expected in January, unless they had been met. Progress toward the goals was not expected to be sufficient to enable the Student to reach any of them

by March 2013, as evidenced by the fact that a new annual review date for the goals was created, the following January, ten months after the previous expected goal mastery date. On top of this, and inexplicably, the services provided to the Student to help her reach the goals were reduced, including the removal of the BIP. It appears there were two choices to make under the circumstances at the January 2013 IEP team meeting: 1) reduce services and extend the deadline for mastery of what were supposed to be annual goals; or 2) increase or improve the quality of the services in order to ensure they assisted the Student to reach the annual goals by the end of March 2013. Only one of these is the correct choice and the Respondent did not ensure the IEP team made it. Thus, the IEP was not reasonably calculated to enable the Student to make progress in and be involved in the general education curriculum, and meet her other needs resulting from her disability, and it denied her a FAPE. Her continued and increasing behavior problems, as well as failing grades, all demonstrate the denial of FAPE resulting from the January 2013 IEP, as well as the Principal's statements to the Petitioner that his school was not appropriate for the Student.[49]

5. Generally, a reevaluation must be provided when a parent requests. 34 C.F.R. § 300.303(a)(2). However, there may be circumstances when a reevaluation is not appropriate, such was when an evaluation was recently conducted. A prior written notice must be provided whenever the Respondent refuses to provide a reevaluation of a Student, including an explanation for the refusal and the data upon which those reasons are based. 34 C.F.R. § 300.503.

6. In this case the Petitioner requested a reevaluation one year after the Student's initial evaluation. The Respondent did not timely respond, but there is no evidence this resulted in a

[49] Of course, the Principal's statement to this effect may also raise other questions beyond the authority of an IDEA hearing officer, such as whether there was discrimination on the basis of the Student's disabling condition.

denial of FAPE to the Student. Further, the Respondent would have been justified in refusing to conduct a reevaluation, because the Student's initial evaluation had been completed only a year prior, and there were no significant changes in the Student's behavior (other than an increase in problem behaviors) that would warrant a reevaluation at that time. (An FBA had been conducted in November 2011.) Thus, the violation requires no remedy. There may have been a failure to implement the Student's BIP, but this was not raised as an issue in the complaint initiating this process.

7. 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). When considering prospective nonpublic placement as a remedy to ensure the provision of FAPE the following factors must be considered: 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 private school; d) the reasonableness of the placement's cost; and e) the extent to which the placement represents the least restrictive environment. Branham v. District of Columbia, 427 F. 3d 7, 12, (D.C. Cir. 2005). "Because placement decisions implicate equitable considerations, moreover, courts may also consider the parties' conduct." Id., *citing* Reid v. District of Columbia, 401 F.3d 516, 524, (D.C. Cir. 2005).

8. 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 v. District of Columbia, 770 F.Supp.2d 270, 277 (D.D.C. 2011), *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).

9. The proposed remedy of placement of the Student at the Non-public School is appropriate in this case as both a compensatory remedy for the failure to ensure the Student reached her goals by March 2013, and as prospective placement. Had the Student been provided a proper IEP, she would have reached her annual goals by the end of March, 2013. The IEP was incorrectly changed to reduce services, including the removal of the BIP, and extended the time to reach the goals by nearly a year, a gross violation of IDEA and warranting a remedy of a school that can reasonably be expected to enable the Student to be involved in and progress in the general education curriculum and meet the Student's needs resulting from her emotional disturbance. The Student's behaviors are a direct result of her disability, and even the Principal of the attending school believes the Student's needs cannot be met there. The Student's behaviors did not get the interventions required, and the Non-public School is designed to do just that, and will enable the Student to progress academically as well as functionally. Given the Respondent made no offer of an alternative proposed public placement, the special school proposed by the Petitioner, where the Student has been

accepted, is an appropriate prospective and remedial placement for the 2013-2014 school year.

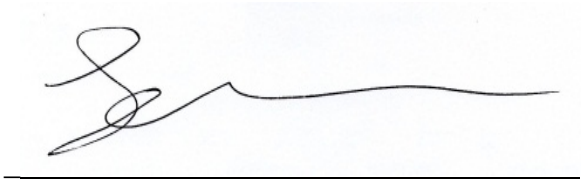
VII. DECISON

1. The Respondent denied the Student a FAPE when it did not offer or provide her with an IEP reasonably calculated to enable her to be involved in and make progress in the general education curriculum, or meet each of her other educational needs that result from her disability, when the IEP proposed January 23, 2013: lacked a statement of her present levels of academic achievement and functional performance; the annual goals were extended by nearly a year; included an unexplained reduction in the level of specialized instruction, despite the lack of progress toward goals; and the BIP was removed despite continued behavioral problems.
2. The Respondent failed to respond to the Petitioner's request for a reevaluation of the Student in February 2013. This is a procedural violation and resulted in no denial of FAPE.

VIII. ORDER

The Student will be placed, at public expense, at the Non-public School for the 2013-2014 school year. The IEP team will meet within two weeks of the start of school (before or after) to review and revise her IEP for the 2013-2014 school year. Transportation between the Student's home and the Non-public School, and all related services determined necessary by the IEP team, will be provided at public expense.

IT IS SO ORDERED.



Date: July 8, 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).