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Sent: Friday, November 23, 2012 7:03 PM
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Cc: Selbka, Joseph (OSSE-Contractor)
Subject: DCSHO: Re: Case # 2012-0572, Mark Mathis v. DCPS From <joseph.selbka@dc.gov>
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** This email was sent by Joseph Selbka [mailto: joseph.selbka@dc.gov] **

See attached a final decision in this matter.

Joe Selbka
Hearing Officer

DC Office of the State Superintendent of Education

Office of Review & Compliance
Student Hearing Office
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STUDENT[1], by and through Student's Parent Petitioners, v. DCPS Respondent.	HEARING OFFICER'S DETERMINATION Case No: 2012-0572 Representatives: Kiran Hassan, and William Jaffe Impartial Hearing Officer: Joseph Selbka

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

I. Introduction and Procedural Background

1. Student is a [redacted] with multiple disabilities. Student is technically in 3rd Grade but reads and writes at a first grade level (Compensatory Education Consultant Testimony, Educational Advocate Testimony). Student has a learning disability. *Id.* Student has attention deficit hyperactivity disorder. *Id.* Student also has multiple behavioral issues which manifest in the classroom (School Social Worker Testimony, Educational Advocate Testimony).

2. The Circumstances which prompted this hearing was a claim that the District failed to provide Student FAPE in 2011-2012 school year; the goals in Student's most recent IEP were inappropriate necessitating a private placement; the Student needed a designated aide to be provided FAPE; Student's 2011-2012 IEP was not implemented properly.

3. The parties agree that the complaint was filed on August 23, 2012. The parties have conducted a resolution meeting on September 6, 2012, while the thirty day timeline ended on September 22, 2012. The parties did not agree to shorten or waive the resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on September 23, 2012. Two motions to continue were granted as the hearing date of October 31, 2012, had to be cancelled due to Hurricane Sandy. The motions to continue continued the 45 day timeline to November 13 and 23, 2012, respectively. Accordingly, a final decision shall be due on November 23, 2012.

4. The District filed a timely response on August 31, 2012.

5. A prehearing conference occurred on September 17, 2012, which resulted in a prehearing order that issued on September 17, 2012. The hearing occurred on November 16, 2012 in Room 2003 of the Student Hearing Office and September 13, 2012, in Room 2009 of the Student Hearing Office. The Parent called five witnesses: Parent, Independent Psychologist, Educational Advocate, Compensatory Education Consultant, Educational Director, Intake Person. Parent Exhibits ##1-24 were admitted into evidence without objection. District Exhibits ##1-4, were admitted into evidence without objection. The District called two witnesses, School Social Worker and Teacher. Kiran Hassan represented the Parent. William Jaffe represented the District. The hearing was closed to the public. Closing arguments occurred, not closing briefs.

7. The due process hearing was held and a decision in this matter is being rendered, pursuant to 20 U.S.C.A. 1400 et seq., and its implementing regulations, 34 CFR 300 et seq. and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

II. Issues to be Decided

8. The issues raised by the Petitioner initially were:

Issue #1- Whether the District denied Student FAPE by failing to develop appropriate goals, specifically goals aligned with Students present levels of performance at a May, 2012, IEP meeting;

Issue #2- Whether the District denied Student FAPE by failing to place Student in a private special education day school during Student's May, 2012, IEP meeting

Issue #3- Whether the District denied Student FAPE by failing to provide a dedicated aide at the May, 2012, IEP meeting.

The District subsequently stipulated that it would provide Student a dedicated aide and Issue #3 was withdrawn on the record by Parent. Parent seeks 156 hours of tutoring in math, writing, and reading; 44 hours of behavioral counseling; a private placement; and declaratory relief. The District denies that Parent is entitled to any further relief.

III. Findings of Fact

Manifestations of Student's Disabilities and Student's Current Achievement in School

9. The parties stipulate that Student has a disability within the meaning of IDEA and requires a 100% out of general education placement (Prehearing Order, #3d). Student has ADHD as well as a specific learning disability (Parent Testimony). Student' s learning disability causes him to have great difficulties in learning to read (Teacher Testimony). Student's ADHD cannot be controlled by medication to a greater extent than the ADHD is currently controlled by medication (Parent Testimony). The medication suppresses Student's appetite, and a greater dose would put Student's health in jeopardy (Parent Testimony).

10. Student's ADHD results in Student being unavailable for learning in regard to reading class (Teacher Testimony, Parent Testimony, School Social Worker Testimony). Student often wakes in the morning, and is so hyper as to be unable to sit and concentrate (Parent Testimony). It often takes Parent an extensive amount of time to calm Student to the extent necessary for Student to be taken to school (Parent Testimony).

11. Specifically, Student is often unable to regulate his behaviors (especially in the morning) (Parent Testimony, School Social Worker Testimony). In general, Student is completely unteachable until 11:00 a.m. every day (School Social Worker Testimony). At that point daily, Student becomes calmer and is available to learn (Teacher Testimony, School Social Worker Testimony).

12. Because of Student's difficulties in the morning, Student has often been late to school in the past (Parent Testimony, School Social Worker Testimony). According to the District, Student has continued to come to school late during the current school year (School Social Worker Testimony). In light of Parent's testimony that Student generally wakes up in a highly agitated state (Parent Testimony), the undersigned makes a credibility finding that Student continues to come to school late on many days.

13. Regardless of whether Student arrives to school on time, Student is overstimulated, defiant, aggressive, unable to learn, unable to remain in a seat (or even a classroom) for the first few hours of a school day (School Social Worker Testimony). When Student arrives to school on time, the District provides for some free time at the beginning of the day for Student so that he can work out some of his energy (School Social Worker Testimony).

14. Student has the cognitive ability to learn to read, write, and complete math at approximately grade level (Teacher Testimony). However, he is currently at 1st or 2nd grade level in reading (Educational Advocate Testimony, Teacher Testimony, Compensatory Education Consultant).

15. Student is making some progress in math, but has significant problems when doing math requires reading- such as in completing word problems (Compensatory Education Consultant).

16. At the hearing, neither party provided sufficient evidence of Student's current grade level and ability in writing (Compensatory Education Consultant Testimony) . The IEP progress reports show that Student had not met his goal in writing as to the July 7, 2011, IEP(amended in November, 2011) (S.D. Ex. R3-7,8, 11, 12)—although Student has apparently made some progress in writing (*Id.*). Based on the fact that Student has not made his goals in writing , the undersigned makes an inference that Student is not making satisfactory progress in written expression.

17. Student is making minimal progress in reading (Educational Advocate Testimony, Teacher Testimony). Student is making some minimal progress as measured by the District's "DIBLS" reading program (Teacher Testimony). However, Student is far below grade level in reading despite his cognitive ability (Independent Psychologist Testimony). Student has problems decoding words and is still attempting to master phonics (Educational Advocate Testimony). Student has not reached his goals from his previous IEP in reading (Educational Advocate Testimony, SD Ex. R3-7,8,11).

18. Student has made, at best, minimal progress in meeting his social-emotional goals (School Social Worker Testimony, SD Ex. R3-8,9,16,17). School Social Worker has provided Student with extensive 1:1 services due to Student's consistent behavioral problems in the classroom (School Social Worker Testimony, Educational Advocate Testimony).

19. Student dislikes reading (P9, Parent Testimony). It is unclear whether instruction in reading is a trigger for Student's behavior or whether Student can simply do no school work in the morning.

Student's Current Placement, Accommodations, and Proposed IEP

20. Student's previous IEP was dated July 7, 2011, and was amended on November 18, 2011 (P Ex. 7 and P. Ex. 8).

21. The District conducted an IEP meeting on May 16, 2012, which Parent attended (Parent Testimony, Educational Advocate Testimony). Although portions of a proposed IEP were testified to, no proposed IEP arising from the May 12, 2012, meeting was submitted into evidence. Neither the Parent's attorney nor the District's attorney knew whether a proposed IEP arising from the May 16, 2012, IEP meeting had even been drafted (Parent Attorney admission, District Attorney admission).

22. No testimony or evidence was presented that the accommodations and services provided to Student after May 16, 2012, are different than Student had been previously receiving and/or listed in Student's 2011 IEP. Moreover, the District personnel at hearing admitted that they could not think of any additional accommodations and services to offer or provide Student (School Social Worker Testimony, Teacher Testimony). As such, the undersigned makes a credibility finding that the District is

providing the same accommodations and services as in the previous IEP dated July 6, 2011, and amended November 18, 2011.

23. At the IEP Meeting on May 16, 2012, the parties agreed that the Student's goals would remain the same as from the previous IEP (Educational Advocate Testimony). This was done at the specific request of Parent and her Educational Advocate (Educational Advocate Testimony, Teacher Testimony). Educational Advocate further testified at the hearing that the goals from the previous IEP were appropriate for Student (Educational Advocate Testimony).

24. Current LOS has a licensed social worker on staff at all times and behavioral technicians available to deescalate Student (Teacher Testimony, School Social Worker Testimony). There is a de-escalation room available at Current LOS where Student can be deescalated (School Social Worker Testimony, Teacher Testimony).

25. Student has a dedicated aide at Current LOS, and his classes are taught in a classroom with nine students and 4 educators (Teacher Testimony). Current LOS uses research based reading techniques for learning disabled students in reading (Teacher Testimony). Student can learn reading at his own pace (Teacher Testimony).

26. Student receives extensive counseling at Current LOS (School Social Worker Testimony). Student receives more counseling time than his previous IEP allocates to him due to the numerous crisis counseling sessions for Student (School Social Worker Testimony).

27. Parent submitted no evidence that Current LOS cannot implement Student's IEP and/or cannot implement the types of modifications Parent is claiming Student needs. Parent's attorney admitted that the services and accommodations offered by the Proposed Private Placement and Current LOS are similar (Parent Counsel Closing Argument Admission). Indeed, the services and accommodations offered at Current LOS are a better match for Student that the Proposed Private Placement according to Student's Educational Advocate (Educational Advocate Testimony). Specifically, Current LOS has a de-escalation room and behavior technicians- something the Proposed Private Placement lacks (Private Placement Director Testimony, Teacher Testimony, School Social Worker Testimony) . Current LOS has all the attributes of a therapeutic environment testified to by Educational Advocate which Parent contends Student needs to obtain FAPE (See Educational Advocate Testimony, School Social Worker Testimony, Teacher Testimony).

Considerations Which went into the Proposed IEP

28. Despite the fact that Student is not making satisfactory progress (especially in reading and social-emotional development, but also in writing and math), the District has not considered additional accommodations, services, or changes in methodology since November, 2011 (School Social Worker Testimony, Teacher Testimony). The District staff at hearing did not provide any possible change wherein the IEP (in either design or implementation) could be modified to offer a better chance of providing Student with an educational benefit (*Id.*). The District staff's silence came in the face of direct questioning on this matter (*Id.*).

29. Rather than determine how to change Student's IEP, the District placed full blame for Student's lack of progress on Parent's unwillingness to increase Student's medication and the fact that Parent cancelled independent therapy for Student (District Attorney oral argument, School Social Worker Testimony).

30. All parties agree that reading is Student's greatest academic weaknesses. The District did not consider changing Student's schedule for reading class so that he might be taught at a time when he might be available for learning—even though the District claims Student learns better in the afternoon. The District also did not propose 1:1 reading instruction for Student even though he has benefited from 1:1 reading in the past (See P.Ex. P7,pg. 4). Moreover, the Compensatory Education Consultant was able to determine that Student benefited from 1:1 instruction in reading after a short instruction session with Student (Compensatory Education Consultant Testimony).

31. The District did not propose to provide transportation for Student even though one of the problems identified by District staff is that Parent has problems getting Student to school in the morning (School Social Worker Testimony, Teacher Testimony).

32. The District did not propose or even determine whether family or individual therapy would be necessary for Student to benefit from special education even though numerous witnesses, including District witnesses, testified that outside therapy for Student would be helpful in allowing Student to be available for learning (Teacher Testimony, School Social Worker Testimony). Similarly, the District did not consider whether the Parent needed counseling and training in order to allow Student to benefit from special education- despite the testimony of District personnel and the arguments by District counsel that Parent has been unable to control her child to the extent necessary to get him to school on time or provide her child with therapy (District Counsel Argument, School Social Worker Testimony).

33. In light of the failure of the District to consider the above possible accommodations, services, and changes to Student, the District failed to consider Student's unique needs and abilities in designing and implementing Student's IEP. As such, the undersigned makes an inference that the District failed to provide a program for Student reasonably calculated to provide Student with an educational benefit.

<u>The Request for Compensatory Education</u>

34. The Parent has requested compensatory education in the form of 52 hours of reading instruction; 52 hours of writing instruction; and 52 hours of math instruction in a 1:1 setting; as well as 44 hours of behavioral counseling (social work services) to make up for the failure of the District to properly accommodate Student's disabilities (Compensatory Education Consultant Testimony). The Compensatory Education Consultant evaluated Student's abilities and readiness for learning, and after determining Student's relative abilities in math and reading, determined that the above stated hours would make up for the lack of educational benefit Student would have received if the District had provided Student FAPE. Specifically, all parties agree Student has deficits in reading and behavioral functioning. Moreover, Student's problems in math arise from his inability to read properly (as he has problems with word problems). Also, the Compensatory Education Consultant noted that Student learns better in 1:1 setting (Compensatory Education Consultant Testimony). As such, the Consultant

opined that the hours set forth above of 1:1 tutoring would compensate Student for lost educational benefit.

35. Similarly, Student needs behavioral support, and the Consultant opined that 1:1 counseling would be an appropriate way to provide said support (*Id.*). The Consultant's opinion is supported by the fact that Student does well with 1:1 support, tutoring, and counseling (*Id See also,* School Social Worker Testimony).

36. The Compensatory Education Consultant was not able to discern Student's writing ability (*Id.*). However, the Compensatory Education Consultant's opinion was based upon an assumption of Student not having made sufficient progress in writing in the last IEP (*Id.*). The Consultant's assumptions are matched by the factual finding of the undersigned that Student was not making sufficient progress in writing as set forth above.

37. The undersigned adopts the opinions of the Compensatory Education Consultant as to the amount of compensatory education necessary to provide Student the educational benefit he lost by not receiving FAPE in that the opinions(as to the amount of compensatory education required to make Student whole) were uncontradicted by any district witness, and the Consultant's conclusions are reasonable given Student's needs, cognitive potential, and the District's failures to provide FAPE as determined by the undersigned in this HOD.

IV. Conclusions of Law

38. The Federal and State Special Education Laws are set out in the Individual with Disabilities Education Act, 20 U.S.C.A. 1400 *et seq.* ("IDEA") and in the District of Columbia Municipal Code. In enacting IDEA, Congress intended to establish a "cooperative federalism." *Evans v. Evans*, 818 F.Supp.1215, 1223 (N.D. Ind. 1993). Compliance with minimum standards set out by the federal act is necessary, but IDEA does not impose a nationally uniform approach to the education of children with a given disability. *Id.* Thus IDEA does not preempt state law if the state standards are more stringent than the federal minimums set by IDEA. *Id.*

39. In regard to the burden of proof in a special education proceeding, the Supreme Court has held that the ultimate burden of persuasion lies with the party filing the due process complaint. *Schaffer v. Weast* 546 U.S. 49 (2005). Parents must prove their case by a preponderance of the evidence. However, once a parent has proven a denial of FAPE, the parents have met their burden. *Henry v. District of Columbia,* 55 IDELR 187, 750 F.Supp.2d 94 (D.D.C. 2010). At that point, the hearing officer must provide the student with an individualized remedy to make the student whole for the denial of FAPE. *Id.*

40. In determining whether a placement is proper under IDEA, the hearing officer does not need to defer to the party witnesses. *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990)(hearing officer characterized as having specialized expertise in special education and special education law); *See also School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162,

1167 (7th Cir. 1994)(hearing officer characterized as expert witness in determining whether placement is proper). A hearing officer can thus use his/her expertise to determine an appropriate placement for the student. *Id.*

41. In administrative proceedings, hearsay is admissible as long as it is relevant and material. *Hoska v. United States Department of the Army,* 677 F.2d 131 (D.C. Cir. 1982); *Johnson v. United States,* 628 F.2d 187 (D.C. Cir. 1980). To the extent hearsay is admitted without objection, the evidence can be given its natural weight. *Sykes v. District of Columbia,* 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

42. Admissions by counsel constitute evidentiary admissions and can be considered by the trier-of - fact. *A-J Marine, Inc. v. Corfu Contractors,* 810 F.Supp.2d 168 (D.D.C. 2011) *Burman v. Phoenix Worldwide Industries, Inc.* 384 F.Supp.2d 316 (D.D.C. 2005).

43. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Bray v. United States,* 306 F.2d 743 (D.C. Cir. 1962); *Dell v. Department of Employment Services,* 499 A.2d 102 (D.C. Ct. of App. 1985). Hearing officers can make reasonable inferences from the evidence adduced at hearing. *Dell, supra.* However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Charles v. Astrue,* 2012 WL 1194707 (D.D.C. 2012).

45. Expert opinions are admissible if the experts are considered qualified through either training or experience. *Jenkins v. United States,* 307 F.2d 637 (D.C. Cir. 1962). To the extent the hearing officer relies upon expert opinions, the expert opinions must be inferred ultimately from facts in the record, and the inferential process by which an expert reaches his/her conclusions must be fully explained. *Giant Food Stores, Inc. v. Fine*, 269 F.2d 542 (D.C. Cir. 1960) (expert testimony must be grounded by material facts in the record); *The Nereide*, 9 Cranch 388 (1815) (in litigation, witnesses must testify as to the train of their inferential reasoning).

46. Expert testimony can be based on facts supplied by a hypothetical question or by testimony from another witness at trial. *Hartford Accident and Indemnity Co. v. Dikomey Manufacturing Jewelers, Inc.* 409 A.2d 1076 (D.C. App. 1979).

47. In determining whether an expert is qualified on a specific subject matter, education, experience, or other training can provide the appropriate qualifications for an expert. *Jenkins v. United States, supra.* See also *Fox v. Dannenberg*, 906 F.2d 1253, 1255 (8th Cir. 1990) and *United States v. Briscoe,* 896 F.2d 1476, 1498-1497 (7th Cir. 1990).

48. Hearing officers are entitled to and often need to make credibility findings. *Stephens Media, LLC v. National Labor Relations Board,* 677 F.3d 1241 (D.C. Cir. 2012).

49. The IDEA also requires a decision based upon substantive grounds based on whether a child received FAPE. 20 U.S.C.A. 1415(f)(3)(i); *A.G. v. District of Columbia.* 57 IDELR 9, 794 F.Supp.2d 133

(D.D.C. 2011). This requirement imposes upon all administrative hearing officers the obligation to structure the hearing so as to properly make an administrative record. *Id.* As in most state administrative proceedings, District of Columbia impartial hearing officers have the power not only to listen to evidence presented by the parties, but to affirmatively find facts necessary to properly to determine which party should prevail under the law. *A.G., supra, Gill v. District of Columbia,* 751 F.Supp.2d 104 (D.D.C. 2010) (the educational needs of a special needs child cannot be forfeited by poor lawyering and an incomplete record); *See also,* Frank Cooper, State Administrative Law, Vol. 1, Bobbs-Merrill Company, Inc. (1965), pg. 336 .

In administrative litigation, the hearing officer must be concerned with not only ensuring a fair process wherein the parties can present evidence, but also a proper result under the law because there is a significant public interest in properly having the law carried out. Landis, John, "*The Administrative Process,*" Yale University Press (1938) excerpted in Foundations of Administrative Law, Schuck, Peter (ed.) Foundation Press (2004), pp. 13-14. For this reason, administrative hearing officers are constitutionally permitted to depart from the adversarial model and independently obtain evidence and develop an administrative record while remaining a neutral and impartial decision maker. *Sims v. Apfel,* 530 U.S. 103, 110-11 (2000); *Richardson v. Perales,* 402 U.S. 389, 400-401 (1971) (social security administrative law judges constitutionally permitted to develop the record to determine all facts necessary whether benefits should be granted under law).

Conclusions of Law Related to Whether Student is Entitled to a Private Location of Services and Placement

50. The undersigned is entitled to find that Student needs a private placement/location of services as compensatory education or if the equities of a situation require such a finding when a district failed to provide a student with FAPE. *Branham v. District of Columbia,* 44 IDELR 149, 427 F.3d 7 (D.C. Cir. 2005). See also *Draper v. Atlanta Independent School System,* 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008). If a District cannot or will not provide a Student with FAPE, the undersigned is able to place Student in a private location of services/private placement. *Id.; See also N.T. v. District of Columbia,* 58 IDELR 69, 839 F.Supp.2d 29 (D.D.C. 2012). However, before ordering a private placement, the undersigned must find that the District is unwilling or unable to design an appropriate IEP for the child with a disability. *N.T. supra.* Similarly, if a district fails to implement major portions of an IEP, this failure amounts to a change of placement, a material failure of implementation of the IEP, and denial of FAPE. *Lunceford v. District of Columbia Board of Education,* 745 F.2d 1577 (D.C. Cir. 1984); *Savoy v. District of Columbia,* 844 F.Supp.2d 23 (D.D.C. 2012). When there is such a serious failure to implement an IEP, this may require a private placement as a remedy for the district's actions—due to the District being unable or unwilling to implement the IEP properly. *Draper v. Atlanta Independent School System,* 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008)

51. Student is entitled to an IEP designed to provide a Free Appropriate Public Education ("FAPE"). FAPE is defined as an educational placement reasonably calculated to provide Student with an educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley,* 458 U.S. 176 (1982). The District need not provide a program designed to maximize Student's educational

potential. *Id.* Rather, the District only needs to provide a program designed to produce substantial educational progress. *Id.*

52. An IEP team must thus develop an IEP which is reasonably calculated to provide the student with an educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley,* 458 U.S. 176 (1982). To do so, the IEP must be reasonably calculated to produce substantial progress, not regression or trivial academic advancement. *M.B. v. Hamilton Southeastern Schools,* 668 F.3d 851 (7th Cir. 2011).

53. A reasonable calculation of an educational benefit is gauged using a student's potential- even though the District is not required to maximize a student's potential in designing an IEP. *Ridgewood Board of Education v. N.E.,* 172 F.3d 238, 247 (3rd Cir. 1999).

54. A District cannot continue to use an IEP which is not producing progress for an extended period of time. *O'Toole v. Olathe District Schools Unified School District No. 233,* 144 F.3d 692 (10th Cir. 1998).

55. Moreover, a District must revise an IEP when the IEP is obviously failing to produce progress or in any other situations when it would be appropriate to do so. 34 CFR 300.325(b); *M.M. v. Special School District No. 1,* 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008).

56. In determining whether IEP design is reasonable, a student's academic progress under the proposed IEP is evidence a hearing officer must consider. *T.H. v. District of Columbia,* 52 IDELR 216, 620 F.Supp.2d 86 (D.D.C. 2009). *Hunter v. District of Columbia,* 51 IDELR 34 (D.D.C. 2008). However, a lack of academic progress is not dispositive of whether the IEP has been reasonably designed to provide a student with FAPE. *Id. See also Lessard v. Wilton Lyndeborough Cooperative School District,* 518 F.3d 18, 29 (1st Cir. 2008). IDEA does not guarantee a particular outcome or attainment of educational level. *N.T. v. District of Columbia,* 58 IDELR 69, 839 F.Supp.2d 29 (D.D.C. 2012).

57. Specifically, when a hearing officer determines whether an IEP is reasonably designed to provide a student with FAPE, the hearing officer must judge the district based upon what the district knew or reasonably could have known at the time the IEP was drafted—not solely on whether academic progress occurred. *S.S. v. Howard Road Academy,* 51 IDELR 151, 585 F.Supp.2d 56 (D.D.C. 2008). *See also M.B. v. Hamilton Southeastern Schools,* 668 F.3d 851 (7th Cir. 2011); *Thompson RJ-J School District v. Luke P.,* 540 F.3d 1143 (10th Cir. 2008); *Adams v. State of Oregon,* 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. East Hannover Board of Education,* 993 F.2d 1031, 1041 (3rd Cir. 1993); *Roland M. v. Concord School Committee,* 910 F.2d 983, 992 (1st Cir. 1990).

58. A hearing officer need not accept school district claims as true regarding the reasonableness of IEP design, but neither should the hearing officer substitute his/her judgment for that of the school officials who have designed the IEP. *School District of the Wisconsin Dells v. Z.S.,* 295 F.3d 671, 37 IDELR 34 (7th Cir. 2002). The hearing officer determines reasonableness, not, what in a hearing officer's judgment, would be the best placement for a student. *Id.*

59. In designing an IEP, the District must take into account the unique strengths, weaknesses, and needs of a student to determine suite of services and accommodations designed to provide the student with an educational benefit. *McKenzie v. Smith,* 771 F.2d 1527,, 1532 (D.C. Cir. 1985).

60. The District must provide related services if such services are necessary for the student to benefit from special education. 20 U.S.C. 1414(d)(1)(A)(IV); 34 CFR 300.34(a). Related services includes transportation to and from school, 34 CFR 300.34(c)(16); group and individual counseling with the disabled child and his/her family, 34 CFR 300.34(c)(14)(ii); working in partnership with parents and other on those problems in a child's living situation which affects the child's adjustment in school, 34 CFR 300.34(c)(14)(iii); mobilizing school and community resources to enable the child to learn as effectively as possible in his/her educational program, 34 CFR 300.34(c)(14)(iv); and counseling and training the parent on how to understand and acquire the skills necessary to aid parents in educating the child, 34 CFR 300.34(c)(8)(i,ii). *Letter to Dagley,* 17 IDELR 1107 (OSEP 1991).

Conclusions of Law Related to Educational Goals

61. The IEP must comply with the requirements set forth in 20 U.S.C.A. 1414(d) in order to provide FAPE. 20 U.S.C.A. 1401(9). Section 1414(d) requires measurable goals designed to meet the child's educational needs that result from the student's disability. *SS v. Howard Road Academy,* 585 F.Supp.2d 56 (D.D.C. 2008); *Sarah D. v. Board of Education of Aptakisic-Tripp Community Consolidated School District No. 102,* 642 F.Supp.2d 804, 52 IDELR 281 (N.D. Ill. 2009).

62. Thus, in order to provide substantive FAPE, an IEP must establish goals which respond to all significant facets of a student's disability, both academic and behavioral. *Sarah D., supra.* When a student has a learning disability, the goals must address the student's learning disability. *Pennsbury School District,* 48 IDELR 262 (PA SEA 2007). When a student has deficits related to attention and behavior in the classroom, the District must have goals to address those aspects of the student's disability. *Bellflower Unified School District,* 54 IDELR 66 (Cal. SEA 2010).

63. Goals should describe what a child with a disability can reasonably be expected to accomplish within a 12 month period in a special education program. *Letter to Butler,* 213 IDELR 118 (OSERS 1988).

Conclusions of Law Related to Remedies

64. Compensatory education is an equitable remedy hearing officers can award to prevailing petitioners. *Reid v. District of Columbia,* 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). Compensatory education should compensate a child for loss of educational opportunity caused by the District's failures to provide FAPE. *Id.* In determining whether compensatory education, the award should be based upon the equitable factors present in each case (including the conduct of the parties). *Id.* A hearing officer's decision should set forth a reasoned way in which the compensatory services will make the student whole for loss of FAPE. *Id.*

65. In making decisions to award a prospective placement at a private locations of services, the undersigned must weigh the equitable factors in each case including: whether a particular placement is

appropriate for the student; the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost; and the extent to which the placement represents the least restrictive environment. *Branham, supra.* The conduct of the parties is also an equitable factor in determining whether a prospective placement is proper. *Id.*

IV. Discussion

66. The undersigned finds that the District denied Student FAPE by failing to consider alternative accommodations, services, and especially related services in designing and implementing Student's IEP and failing to revise Student's IEP within a few months of November, 2011 (when the Amended IEP began to take effect). To wit, the undersigned finds the District failed to consider additional counseling for the Student and Parent; a change in Student's scheduling; 1:1 instruction in reading; transportation; family counseling; and additional counseling and therapy for Student.

67. The undersigned finds that Current LOS can and will implement Student's IEP and any modifications as required by this HOD. In making this finding, the undersigned rejects the opinions of Independent Psychologist, Educational Advocate, and Compensatory Education Consultant. None of the witnesses showed much knowledge of the District's ability to provide therapeutic services at Current LOS. Educational Advocate and Compensatory Education Consultant admitted as much. The undersigned finds Independent Psychologist's testimony not credible. Specifically, Independent Psychologist never independently evaluated Student, never determined all services available at Current LOS, and simply assumed that Current LOS could not provide Student with FAPE because of the fact that Student was not making progress.

68. As such, the undersigned finds that a private placement would be inappropriate because the District can and will implement an IEP and the modifications thereto at Current LOS. The undersigned finds that Current LOS is superior than Proposed Private Placement if one accepts Educational Advocate's testimony as to necessary supports for Student. This is another reason not to require a transfer to Proposed Private Placement.

69. The undersigned finds that it is more likely than not than with a change in the accommodations, services, and/or related services as described above would have been successful in providing Student a substantial educational benefit. The undersigned further finds that it is more likely than not that with different related services, Student would have made acceptable progress in social-emotional functioning. The undersigned finds that 52 hours of tutoring in reading, 52 hours of tutoring in writing, and 52 hours of tutoring in math word problems will compensate Student for lost educational benefit from the District's denial of FAPE. The undersigned further finds that 44 hours of behavioral counseling will compensate Student for the District's failure to provide FAPE in the area of social-emotional development.

70. The undersigned finds that Parent did not meet her burden that the goals in the May, 2012, IEP are inappropriate.

V. Order

71. Within 21 days of this order, the District shall begin to provide 52 hours of tutoring in reading, 52 hours of tutoring in writing; and 52 hours of tutoring in completing mathematics word problems (156 hours of total tutoring). The tutoring must be completed within 18 months of this order. The District may use its own personnel to tutor Student or it may contract for private services. The tutoring must be 1:1 and the tutor must be a certified special education teacher.

72. Within 21 days of this order, the District shall begin to provide 44 hours of counseling designed to train Student to regulate his emotions and control his behaviors. The counseling must be completed within 18 months of this order. The District may use its own personnel to tutor Student or it may contract for private services. The tutoring must be 1:1 and the tutor must be a certified social worker or school psychologist or a licensed clinical psychologist.

73. Within 30 days of this order, the District shall call an IEP meeting and consider which of the following accommodations, services, supports, related services, and IEP revisions are necessary to provide Student with FAPE: Transportation services; family counseling; additional individual counseling; schedule changes for reading instruction; 1:1 teaching in reading and writing by a special education teacher; and any other suggestions by Parent and her attorneys and advocates. The IEP Team shall thereafter adopt all accommodations, related services, supports, services, and IEP revisions necessary to provide Student with FAPE.

74. Parent's other requests in her due process complaint are denied.

Dated this 23rd day of November, 2012.

/S Joseph P. Selbka

Joseph Selbka, Esq.

Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the 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. § 415(i)(2).