

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

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

OSSE
Student Hearing Office
August 26, 2013

[Parent], on behalf of
[Student],¹

Date Issued: August 24, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on June 18, 2013. The Petitioner and Respondent are both represented by counsel. On June 21, 2013, the Respondent was ordered to provide the Petitioner a list of the types and locations of all of the Student's education records collected, maintained, or used by the Respondent, in accordance with 34 C.F.R. § 300.616. This was done June 27, 2013. A response to the complaint was also filed by the Respondent on June 27, 2013. A prehearing conference was convened on July 2, 2013, and a prehearing order was issued on that date. A revised prehearing order was issued on July 12, 2013. A resolution meeting was held on July 3, 2013, and resulted in an agreement on July 11, 2013, that no agreement was possible, starting the 45-day hearing timeline.

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

The Petitioner filed a motion to permit the testimony of one of her witnesses via telephone on July 31, 2013. Permission was granted by the Undersigned on August 2, 2013.

Both parties filed their trial briefs and exchanged their disclosures on August 6, 2013. The hearing was convened at 9:00 a.m. on Tuesday, August 13, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing recessed at 4:30 p.m. and resumed on Wednesday, August 14, 2013, at 9:30 a.m., and ended at 3:50 p.m. The due date for this Hearing Officer's Determination (HOD) is August 25, 2013. This HOD is issued on August 24, 2013.

II. JURISDICTION

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

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

1. Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to comprehensively reevaluate the Student in all areas of suspected disability, when warranted by his educational and related services needs as of and since June 18, 2011?
2. Whether the Respondent denied the Student a FAPE when it failed to provide the Student with occupational therapy (OT), speech and language services, a behavior intervention plan (BIP), and counseling services in conformity with his individualized education program (IEP) since June 18, 2011?
3. Whether the Respondent denied the Student a FAPE when it did not provide the Student with an IEP reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of his other needs resulting from his disability, because the IEP in all its revisions since June 18, 2011,

- did not include: 1) an accurate statement of the Student's present levels of academic achievement and functional performance (because the Respondent did not rely on current or accurate evaluation data); 2) measurable annual goals (the goals were not measurable and some were not related to his needs or present levels of performance); and 3) special education and related services, and supplementary aids and services, based on peer-reviewed research, and a statement of the program modifications or supports for school personnel that will be provided to enable the Student to meet appropriate goals and to make academic and functional progress (because the IEP lacked "full-time" specialized instruction outside of the general education setting in a setting with a low student to teacher ratio, structured reading instruction, behavioral supports including a BIP and individual counseling, specialized transportation, extended school year (ESY) services, speech and language therapy, occupational therapy (OT), a full-time therapeutic educational environment, etc.)?
4. Whether the Respondent denied the Student a FAPE because his parent was not provided a prior written notice of the Respondent's refusals of the services and placements requested in December 2012, January 2012, and March 2013, significantly impeding her opportunity to participate in the decision-making process regarding the provision of FAPE to the Student?
 5. Whether the Respondent denied the Student a FAPE since June 18, 2011, when it failed to review and revise his IEP so that his IEP would have been developed by IEP teams that included all required team members and so that any lack of progress, new information, anticipated needs, or other matters were addressed?

The Petitioner is seeking prospective placement of the Student in a small structured therapeutic non-public special education day school and compensatory education consisting of approximately 200 hours of tutoring and 40 to 50 hours each of speech and language services, OT, and individual counseling.

The Petitioner did not prove that the Respondent failed to comprehensively reevaluate the Student in all areas of suspected disability since June 18, 2011. The Respondent's failure to implement approximately 50% of the Student's related services was a denial of FAPE. The IEP was not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum and meet each of the Student's other needs resulting from his disability because it lacked an accurate statement of the Student's present levels of academic

achievement and functional performance. This rendered the remainder of the IEP without an accurate basis for formulation since at least the revision of January 2012. The allegations regarding the procedural violations concerning prior written notice and the lack of particular team members at IEP team meetings are moot because of the substantive denials of FAPE found here and the limited time to render a decision requires focus on the substantive denials of a FAPE.

IV. EVIDENCE

Seven witnesses testified at the hearing, four for the Petitioner and three for the Respondent.

The Petitioner's witnesses were:

1. _____, a Psychologist who evaluated the Student. C.M. provided an expert opinion on the Student's needs, evaluations, progress, and the impact of the Student's diagnosis on his educational progress.
2. _____, an Education Advocate, who provided an expert opinion on the Student's evaluations, IEP and BIP, placement, and compensatory education.
3. _____, an Investigator.
4. The Petitioner.

The Respondent's witnesses were:

1. _____, a Speech Language Pathologist.
2. _____, a Special Education Teacher.
3. _____, a Special Education Coordinator.

All 38 of the Petitioner's disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. All 11 of the Respondent's disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B. The parties submitted seven joint exhibits that were also entered into the record and are listed in Appendix C.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any

credibility issues are specifically noted in the findings of fact. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

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

1. Student _____ with a disability enrolled in the Attending School.² He completed the third grade for the 2012-2013 school year.³
2. Student was determined eligible for special education and related services during Kindergarten _____.⁴ The Student has been determined to meet the definition of Multiple Disabilities under the IDEA by the Respondent.⁵
3. The Student suffers from: Attention Deficit Hyperactivity Disorder, Combined Type; Disruptive Behavior Disorder; Adjustment Disorder with Mixed Disturbance of Emotions and Conduct; Reading Disorder; and Disorder of Written Expression.⁶ He also suffers from Asthma and often misses school due to attacks and medical appointments.⁷

² Testimony (T) of P.

³ T of P.

⁴ P 1.

⁵ J 7.

⁶ P 7.

⁷ T of P.

4. When the Student was initially evaluated, the Respondent used a screening tool (RAIS) to measure his cognitive functioning, which resulted in an artificially inflated measurement.⁸ His real cognitive functioning is within the Borderline range.⁹ He has limited general verbal abilities, and his acquired skills and reasoning abilities are poor.¹⁰ His acquired oral vocabulary skills are limited.¹¹ His knowledge of social norms, mores, and his social comprehension, are in the Borderline range.¹²
5. The Student's working memory is below average and he struggles to mentally reorganize numbers and letters, demonstrating difficulties with complex attention and executive functioning, which likely has a negative impact on his learning.¹³
6. The Student performs stronger on non-verbal tasks.¹⁴ His visual-motor integration is in the Low Average range and non-verbal problem solving in the Borderline range.¹⁵
7. The Student works slowly and his processing speed is in the Borderline range.¹⁶
8. The Student has a pronounced visual-spatial processing deficit, which means he does not view the world as others do, and tends to perceive individual pieces more so than the whole.¹⁷
9. In May 2012, the Student was functioning academically near where his intellect would allow him and below grade level.¹⁸ The Student's academic skills are in the Borderline range and he is currently functioning in the Kindergarten to First Grade level in core academics of

⁸ P 6,

⁹ P 6.

¹⁰ P 6.

¹¹ P 6.

¹² P 6.

¹³ P 6.

¹⁴ P 6.

¹⁵ P 6.

¹⁶ P 6.

¹⁷ P 6.

¹⁸ P 6.

reading, writing, and mathematics.¹⁹ The Student made no appreciable academic gains from
-2012 through 2013²⁰

10. The Student has few psychological coping resources and his self-perception is negative when he compares himself to others.²¹ He manifests low self-esteem and feelings of insecurity and inadequacy when dealing with problems.²² He requires a great deal of emotional and physical support and is not sure how to obtain it.²³ He does not perceive the world as a place where positive interactions with others are a matter of course, resulting in considerable conflict.²⁴ When he does not get what he wants he can become easily frustrated and reactive.²⁵ The Student can be easily overwhelmed by emotional situations, and when this occurs he is likely to act impulsively.²⁶ He also shows a very poor ability to modulate his expressions of emotion, particularly when overly stressed.²⁷

11. An initial psychological evaluation was completed by the Respondent and a report written
The Respondent conducted a speech and language assessment of the Student on January 5, 2010, which did not result in any speech and language services at that time.²⁹ A functional behavior assessment (FBA) was conducted February 2012, which resulted in a BIP on March 1, 2012.³⁰ An independent Speech and Language assessment was conducted on March 2, 2012, which was reviewed by the Respondent on May 16, 2012, and

¹⁹ P 6, P 7,

²⁰ P 7,

²¹ P 6.

²² P 6.

²³ P 6.

²⁴ P 6.

²⁵ P 6.

²⁶ P 6.

²⁷ P 6.

²⁸ P 1.

²⁹ P 2, testified that she conducted this assessment, and then provided speech and language services to the Student. However, the oldest IEP revision in the record (J 1) from February 2011, does not indicate any speech and language services. No speech and language services appear in the Student's IEP until May 2012, over two years later.)

³⁰ P 3, J 3.

resulted in the addition of Speech and Language services on the IEP in May 2012.³¹ An Occupational Therapy assessment was conducted on March 5, 2012 by an independent provider, and resulted in OT services in May 2012.³² An independent psychological evaluation was conducted on February 29, 2012, conducted a follow-up evaluation in May 2013.³⁴

12. The Student's IEP was revised 2011.³⁵ The Petitioner agreed with that IEP and did not challenge it.³⁶ This revision of the IEP was in place two years prior to the filing of the complaint in this matter.

13. The IEP was next revised January 2012.³⁷ The statement of the Student's present levels of academic achievement and functional performance did not accurately reflect his academic functioning, which was lower than recorded in the IEP.³⁸ The five functional goals, concerning behavior, were the same goals he was to have achieved by the time the IEP was revised in January 2012.³⁹ The IEP required 15 hours per week of specialized instruction outside of the general education setting, five hour per week more than the previous IEP revision, and 240 minutes per month of behavioral support services outside of the general education setting, about twice as much as the behavioral support services for the prior IEP revision.⁴⁰ The IEP included the related services of transportation via bus and ESY services during the month of July 2012.⁴¹ The IEP also included several supplementary aids and

³¹ P 4, R 7, J 4.

³² P 5, J 4.

³³ P 6.

³⁴ P 7.

³⁵ J 1.

³⁶ J 1.

³⁷ J 2.

³⁸ J 2,

³⁹ J 1, J 2.

⁴⁰ J 1, J 2.

⁴¹ J 2.

services, including: interpretation of oral directions; markers to maintain place; reading of test questions; repetition of directions; simplification of oral directions; oral responses to tests; write in test books; dictate responses to examiner; small group testing; location with minimal distractions; preferential seating; flexible scheduling; tests administered over several days; tests administered at best time of day for Student (unspecified); breaks between subtests; and extended time on subtests.⁴²

14. 2012, a BIP was added to the IEP, addressing the Student's leaving the classroom, reducing hyperactivity, and complying with school rules.⁴³
15. The IEP was further amended on May 17, 2012, to revise the statement of the Student's present levels of functional performance, annual goals, and services.⁴⁴ The Student's performance in communication/speech and language was added to the IEP, as well as four communication goals and 240 minutes per month of speech and language services beginning May 17, 2012.⁴⁵ The Student's motor skill/physical development performance was also added, as well as four motor skills goals and 240 minutes per month of OT services beginning May 17, 2012.⁴⁶
16. The IEP was next revised on December 11, 2012.⁴⁷ The statement of the Student's present levels of academic achievement and functional performance were revised and were still not accurate.⁴⁸ Goals in writing were largely identical to the previous year's goals.⁴⁹ The

⁴² J 2. (These "classroom accommodations" are identical to accommodations listed for taking the Statewide Assessment.)

⁴³ J 3.

⁴⁴ J 4.

⁴⁵ J 4.

⁴⁶ J 4.

⁴⁷ J 5.

⁴⁸ (The reevaluation in May 2013 showed the Student had not made meaningful academic progress since March 2012.)

⁴⁹ J 4, J 5.

functional goals for behavior, again, did not change.⁵⁰ Specialized instruction remained at 15 hours per week outside of the general education setting.⁵¹ Behavioral Support Services, OT, and Speech and Language Services all remained at 240 minutes, each, per month, outside of the general education setting.⁵² All remaining supplementary aids and services remained the same, but for ESY services which were removed.⁵³

17. On March 4, 2013, the IEP was amended and the BIP was revised.⁵⁴ The behaviors addressed in the BIP were: behaviors during transitions between classes, and again, leaving the classroom without permission.⁵⁵ New positive reinforcements were added, and consequences remained the same.⁵⁶ ESY services for July 2013 were added to the IEP.⁵⁷

18. The Petitioner did not send the Student to ESY for July 2012 or July 2013.⁵⁸ The Student also missed approximately 30 days of school during the 2012-2013 school year, mostly for medical reasons.⁵⁹

19. During the 2011-2012 school year, the Student was provided with 120 minutes of the 240 minutes (50%) of OT services he was entitled to.⁶⁰ During the 2012-2013 school year, the

⁵⁰ J 4, J 5.

⁵¹ J 5.

⁵² J 5.

⁵³ J 5.

⁵⁴ J 6, J 7.

⁵⁵ J 6.

⁵⁶ J 3, J 6.

⁵⁷ J 7.

⁵⁸

(P testified that she did not send the Student to ESY one summer because the bus did not come to pick him up and she did not know who to call. This is entirely unreasonable given that the Petitioner worked closely with the Respondent's staff and had an attorney since at least January 2012. (T of P, J 2).

⁵⁹ R 1, T of P. (The attendance records are not precise, given the fact the sometimes the Student was present but in classroom. T

J 4, R 3.

Student was provided with 1,205 minutes (50%) of the 2,400 minutes of OT services he was entitled to.⁶¹

20. During the 2011-2012 school year, the Student was provided with none of the 240 minutes of Speech and Language Services he was entitled to.⁶² During the 2012-2013 school year, the Student was provided with 1,120 minutes of the 2,400 minutes (47%) of Speech and Language Services he was entitled to.⁶³

21. During the 2011-2012 school year, the Student was provided with 1,050 minutes of the 2,400 minutes (44%) of counseling (Behavior Support Services) he was entitled to.⁶⁴ During the 2012-2013 school year, the Student was provided with 1,230 minutes of the 2,400 minutes (51%) of counseling he was entitled to.⁶⁵

22. The Student missed related services for various reasons (not including during ESY) including being absent from school, school being closed, and various school activities.⁶⁶ The Respondent does not require service sessions missed due to scheduling issues (e.g. holidays and school closures) or student absences to be made up.⁶⁷

23. The Student's Special Education Teacher and his school's Special Education Coordinator believe the Student's educational placement should be based on their desire for the Student to have contact with non-disabled peers and on the assumption (or a flawed programming

⁶¹ J 5, R 3. (The entitled numbers are based 10 months of school, using September through June and the IEP requirement of a monthly amount of services, not weekly. This applies to all of the calculations for the 2012-2013 school year made herein, and the calculation for the 2011-2012 counseling services.)

⁶² J 4, R 4.

⁶³ J 5, R 4.

⁶⁴ J 4, R 5.

⁶⁵ J 5, R 5.

⁶⁶ R 3, R 4, R 5.

⁶⁷

model) that he will not be exposed to the general education curriculum if placed in a segregated classroom or school.⁶⁸

24. At the end of both the Student's second and third grade years (2011-2012 School year and 2012-2013 School Year) the Student's report card scores were nearly all in the "Beginning" range (of "Secure," "Developing," "Beginning," or "Not Introduced").⁶⁹
25. The Student currently requires, based on the most recent evaluation data, 30 hours of specialized instruction in a small segregated class with at least two staff and no more than nine students.⁷⁰ The Student requires his current related services of speech and language and OT, and only 30 minutes per week of counseling services.⁷¹ The Student requires a detailed sensory diet and a safe place to go when his behavior is interfering with class or is otherwise out of control.⁷² All of his classes must be highly structured to avoid unnecessary distractions for the Student.⁷³
26. To catch the Student up to where he would have been but for the denial of a FAPE, he requires 120 hours of direct phonics-based reading instruction and 120 hours of counseling.⁷⁴ He requires 60 hours of discrete math instruction.⁷⁵ He requires 40 hours of OT and 80 hours of speech and language service.⁷⁶

⁶⁹P 11, P 16.

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. Pursuant to 34 C.F.R. § 300.303(a):

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311 —

- (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
- (2) If the child's parent or teacher requests a reevaluation.

Further, when conducting the evaluation, the agency must ensure, among other things:

- (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

and that

the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

34 C.F.R. § 300.304(c)(4) & (6).

3. The Petitioner has not shown that the Student has not been assessment in all areas related to the suspected disability or that any evaluation over the last two years has not been

sufficiently comprehensive to identify all of his special education and related service needs. There are at least eight assessments in the record, going back to the Student's initial evaluation in 2009. It was argued that further assessment was required when, at the end of the 2010-2011 school year, the Student was not demonstrating meaningful progress on his IEP goals or the in general education curriculum, and that waiting until February 2012 to begin a series of new assessments was an unreasonable delay. However, given the poor IEP implementation, and the plethora of data about the Student obtained in early 2012, any failure to have data at certain points may have merely contributed to the Student's denial of FAPE, and was not the cause of it.

4. The stated purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

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

34 C.F.R. § 300.17. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). In providing a FAPE states and the District of Columbia must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 203 (1982). The special instruction and services "must be provided at public expense, must meet the State's educational

standards, must approximate the grade levels used in the State's regular education, and must comport with the child's [individualized educational program]." Id. In Rowley, the Supreme Court held that courts in the position of assessing whether a child is receiving FAPE must focus on whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201. The Court noted further that there existed "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. 198. However, "[a]cademic success is an important factor 'in determining whether an IEP is reasonably calculated to provide education benefits.'" Roark ex rel. Roark v. District of Columbia, 460 F.Supp.2d 32, 44 (D.D.C. 2006) (emphasis added). Accord Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir.1998) ("An appropriate public education under IDEA is one that is 'likely to produce progress, not regression.'") (citations omitted); Danielle G. v. N.Y. City Dept. of Educ., 2008 WL 3286579, at *7 (E.D.N.Y. Aug. 7, 2008) ("A school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under his IEP, and if the IEP affords the student with an opportunity 'greater than mere trivial advancement.'") (citations omitted); P.K. v. Bedford Cent. Sch. Dist., 2008 WL 2986408, at *11 (S.D.N.Y. Aug. 1, 2008) ("[I]n determining whether a school district has met its obligations under the IDEA, a court must look for objective evidence in the record indicating whether the student would likely have progressed or regressed under the challenged IEP). See Hunter v. District of Columbia, 2008 WL 4307492 at *7 (D.D.C. 2008). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide education benefits.

Suggs v. District of Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under 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).

5. When considering a failure to provide special education and related services in conformity with the IEP, the IDEA “is violated when a school district deviates materially from a student’s IEP.” Wilson v. D.C., 770 F.Supp. 2d 270, 275 (D.D.C. 2011), citing: Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services

required by the child's IEP.”); accord S.S. ex rel. Shank v. Howard Road Acad., 585 F. Supp. 2d 56, 68 (D.D.C. 2008); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), aff'd sub nom. E.C. v. District of Columbia, No. 07-7070 (D.C. Cir. Sept. 11, 2007). “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail” on a failure-to-implement claim. Wilson, at 275 (emphasis in original), citing: Van Duyn, 502 F.3d at 822 (emphasis added); cf. MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). “Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” Id., See, e.g., Van Duyn, 502 F.3d at 822; S.S., 585 F. Supp. 2d at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

6. Of the services required by the IEP and not provided, the Respondent materially failed to provide OT, Speech and Language, and counseling services required during the regular school years for 2011-2012 and 2012-2013. During the 2011-2012 school year only 50% of the required OT was provided, none of the speech and language required was provided, and 44% of the behavior support services were provided. During the 2012-2013 school year, again only 50% of the required OT was provided, 47% of the speech and language required was provided, and 51% of the behavior support services was provided. The Respondent has policies in place to manage the delivery of related services, which appear to have contributed to the denial of FAPE of the Student. For example, when services are missed because the

Student was absent from school, there was no attempt to make the missed services up. Neither IDEA, its regulations, nor District of Columbia law permit services, missed for any reason, whether the student was absent, the school was closed, or the service provider was not available at a particular time, to be legitimately denied. The failure to provide services in conformity with the IEP was a denial of FAPE.

7. 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.

8. The first IEP revision within the two years prior to the complaint was January 26, 2012. This revision included a statement of the Student's present levels of academic achievement and functional performance which were not accurate. The Student was evaluated shortly after this IEP revision, and the evaluator collected data showing the Student's academic functioning in reading, mathematics, and writing was much lower than what the IEP reflected. Without an accurate statement of the present level of performance which, in effect, describe the child's needs, the remainder of the IEP cannot be reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum or meet the child's other needs resulting from his disability. Goals and services are to be based on the child's needs as well as the curriculum, so if those needs are not accurately reflected in the IEP, the goals and services cannot be determined to be appropriate. *See e.g.*, 71 Fed. Reg. 46665 (2006) ("The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team *based on the child's individual needs.*")(Emphasis added.) Furthermore, it is clear the Student was not making any meaningful progress following this IEP, or subsequent IEP revisions, and so it is reasonable to conclude that the IEP was just as much a cause of the Student's lack of meaningful progress as was the failure to implement the IEP.
9. Because of the substantive denials of FAPE stemming from an inappropriate and a failure to implement the IEP, the remaining procedural issues concerning meetings and prior written notice are moot. In addition, they will not be further analyzed due to limited time to generate a timely Hearing Officer Determination.

10. 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).
11. Because the Student's IEP is not reasonably calculated to provide meaningful education benefit, it must be revised. The IEP team will meet and revise the IEP in accordance with the findings of fact, conclusions, determinations and order of this HOD.
12. Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3rd 516, 523, (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., *citing* Reid, 401 F.3d at 524; *see* Stanton ex rel. K.T. v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010). The Petitioner provided uncontroverted expert testimony about the services the Student requires in order to put him in the place he would have been but for the denial of FAPE. This testimony, while uncontroverted, was not entirely reasonable given the amounts of compensatory services requested (e.g. ten hours per week of compensatory services for just reading and counseling

services, not including math instruction, speech and language services, and OT services). Thus, the amounts recommended by P.L. are adjusted to more reasonable services level over a longer period of time, as reflected in the order below.

13. The Petitioner not only seeks compensatory education, but also prospective placement. When considering prospective nonpublic placement as a remedy, 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). Equitable considerations are also a factor when considering prospective placement. Id. In this case, it has not been shown that the Student requires a more restrictive non-public special education day school as prospective placement to ensure FAPE is provided in the future. The reasonableness of the cost cannot be determined because no evidence of cost was entered into the record. Further, while [redacted] recommended a full-time, psychoeducational day school placement, this was based on his conclusion that the special education provided over the last four years has not provided benefit. Such a rudimentary analysis is not reliable, and as found in this case, there are multiple reasons for the Student's lack of educational benefit. Finally, ESY services were part of the Student's program to ensure FAPE, which the Petitioner failed to take advantage of. While this failure does not relieve the Respondent of its responsibility for its own violations herein, it is a factor that cannot be ignored when considering appropriate remedies. While a more restrictive placement is necessary, the IEP team, following revision of the IEP, may find such a placement in a public school. The compensatory education required will remedy the harm

suffered by the Student for prior denials of FAPE and the IEP revision required will see that the Student is provided a FAPE going forward.

VII. DECISION

1. The Petitioner did not prove that the Respondent failed to comprehensively reevaluate the Student in all areas of suspected disability since June 18, 2011.
2. The Respondent's failure to implement approximately 50% of the Student's related services was a denial of FAPE.
3. The IEP was not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum and meet each of the Student's other needs resulting from his disability because it lacked an accurate statement of the Student's present levels of academic achievement and functional performance, rendering the remainder of the IEP without an accurate basis for accurate formulation, since at least the revision of January 2012.
4. Because of the substantive denials of FAPE, the procedural claim concerning prior written notice is deemed moot and unnecessary to examine.
5. Because of the substantive denials of FAPE, the procedural claim concerning lack of particular team members at IEP team meetings is deemed moot and unnecessary to examine.

VIII. ORDER

1. The IEP team must meet by September 27, 2013, to revise the IEP, first incorporating an accurate statement of the Student's present levels of academic achievement and functional performance. The goals must be aligned with the District of Columbia curriculum content

standards, and the services determined based on the Student's needs, including what will be required to enable the Student to meet his goals by the end of the school year and be involved and progress in the general education curriculum. The services will include, at a minimum, 30 hours of specialized instruction per week, in a segregated classroom with at least two staff members and no more than nine students. The current related services of Speech and Language and OT will remain the same, and counseling will be reduced to 30 minutes per week. A detailed sensory diet will be provided, based on the recommendations of P.L. A safe "time-out" room will be in proximity to the Student's classroom(s) (not in his classroom) which will require the Student to be accompanied by a staff person when he must use to room due to behaviors. All classes the Student attends must be highly structured to minimize distractions to the Student. A placement determination must be made by the IEP team based on the IEP and perfected prior to October 15, 2013.

2. The Student will be provided specific, phonics-based, reading instruction, as compensatory education, for two hours and 30 minutes per week over the course of the next calendar year⁷⁷, until the Student has been provided 120 hours of such instruction. Any services missed due to the Petitioner's failure to send the Student will be forfeit. Any services not provided due to Student illness or actions, decisions, or failure to act or decide on behalf of the Respondent or contractors shall be made up, including beyond the one year time period here.
3. The Student will be provided discrete math instruction, as compensatory education, for one hour per week over the next 65 weeks, until the Student has been provided 60 hours of such instruction. Any services missed due to the Petitioner's failure to send the Student will be forfeit. Any services not provided due to Student illness or actions, decisions, or failure to act

⁷⁷ The time for all the compensatory services and education herein starts September 1, 2013.

or decide on behalf of the Respondent or contractors shall be made up, including beyond the 65 week time period here.

4. The Student will be provided occupational therapy, as compensatory services, for one hour per week over the course of the next calendar year, until the Student has been provided 40 hours of such service. Any services missed due to the Petitioner's failure to send the Student will be forfeit. Any services not provided due to Student illness or actions, decisions, or failure to act or decide on behalf of the Respondent or contractors shall be made up, including beyond the one year time period here.
5. The Student will be provided behavioral support services in the form of individual counseling, as compensatory services, for two hours and thirty minutes per week over the course of the next calendar year, until the Student has been provided 120 hours of such service. Any services missed due to the Petitioner's failure to send the Student will be forfeit. Any services not provided due to Student illness or actions, decisions, or failure to act or decide on behalf of the Respondent or contractors shall be made up, including beyond the one year time period here.
6. The Student will be provided speech and language pathology, as compensatory services, for one hour per week over the course of the next two calendar years, until the Student has been provided 80 hours of such service. Any services missed due to the Petitioner's failure to send the Student will be forfeit. Any services not provided due to Student illness or actions, decisions, or failure to act or decide on behalf of the Respondent or contractors shall be made up within the two year period here.

IT IS SO ORDERED.

A handwritten signature in black ink, consisting of a stylized initial 'S' followed by a long, horizontal, wavy line.

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).