

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
August 26, 2014

PETITIONER ¹)	
On behalf of STUDENT)	
)	
Petitioner,)	Date Issued: August 25, 2014
)	
v.)	Hearing Officer: Christal E. Edwards, Esq.
)	
District of Columbia Public Schools (DCPS))	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

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

The DPC was filed June 11, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner (MOTHER), the Student's Parent ("Petitioner"), against Respondent, District of Columbia Public Schools ("Respondent"). Petitioner claims that Respondent denied the Student a Free Appropriate Public Education ("FAPE") because she has not made meaningful educational progress during the statutory period; by failing to comprehensively re-evaluate the Student; by failing to provide Student with an appropriate Individualized Education Program ("IEP") on February 12, 2014; by failing to provide the Student with a placement that could appropriately implement Student's Inadequate February 12, 2014 IEP; because Student's 2013-2014 Educational Placement is inappropriate and no appropriate placement has been

¹ Personal identification information is provided in Appendix A

proposed for the 2014-2015 school year; because the Student's November 14, 2013 and November 28, 2012 IEP were in appropriate; and Respondent denied the Student a FAPE by refusing to permit an independent evaluator to observe Student as part of an independent educational evaluation.

On June 20, 2014, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a FAPE. Specifically, stating that the Student's November 28, 2012 and November 14, 2013 IEPs were appropriate and both increased the special educational services provided to Student. Further, Respondent has conducted an educational assessment on January 8, 2014, a Behavior Screening on January 28, 2014, a Speech and Language Reevaluation on January 30, 2014. Respondent further states that the Student's IEP dated February 12, 2014 is appropriate, the hours of service has been increased, and the Student continues to make progress. Respondent also states that Student current attending school can implement the Student's IEP. Lastly, Respondent objects to allowing Petitioner's educational consultant to observe Student in the classroom because he is not qualified to conduct any assessments of Student, he is only an educational advisor.

During the Prehearing Conference, on or about August 6, 2014, the parties agreed that five-day disclosures would be filed by August 6, 2014 and that the Due Process Hearing ("DPH") would be held on August 13 and 18, 2014.

A Resolution Meeting was held on June 26, 2014, which was within the 15 calendar days of the filing of the DPC; but it failed to resolve the claims in the DPC. The statutory 30-day resolution period ended on July 12, 2014. The 45-day timeline for this Hearing Officer Determination ("HOD") started to run on July 13, 2014 and will conclude on August 25, 2014.

Petitioner's Disclosure Statement, dated August 6, 2014, consisted of a witness list of six (6) witnesses and documents P-1 through P-48. Petitioner withdrew disclosures at P-28, P-40, and P-42 as the issues had been resolved. Petitioner and Respondent agreed to an additional witness from Petitioner's recommended placement and Respondent objected to Petitioner's disclosures at P-48. Petitioner's additional witness was allowed to testify and however, Petitioner's disclosure at P-48 was not admitted. The Petitioner's Exhibits: P-1 through P-27, P-29 through P-39, P-41 and P-43 through P-47 were all admitted. The Petitioner presented the following witnesses in her case in chief:

- (a) Petitioner;
- (b) Petitioner's Community Support Worker;
- (c) Petitioner's Investigator;
- (d) Petitioner's Representative from Recommended Placement; and
- (e) Petitioner's Educational Consultant.

Respondent's Disclosure Statement dated August 6, 2014 consisted of a witness list of six (6) witnesses and documents R-1 through R-6. The Respondent's Exhibits: R-1 through R-15 were all admitted without objections. The Respondent presented the following witnesses:

- (a) Respondent's Program Manager;
- (b) Respondent's Special Education Teacher;
- (c) Respondent's Social Worker; and

(d) Respondent's School Psychologist.

Neither party requested or filed any post hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case, as identified in the Prehearing, are:

Issue #1 – Whether Respondent denied Student a Free and Appropriate Public Education (“FAPE”) because Student Has Not Made Meaningful Educational Progress during the Statutory Period.

Issue #2 – Whether Respondent denied Student a FAPE by failing to Comprehensively Re-evaluate Her.

Issue #3 – Whether Respondent denied Student a FAPE because the February 12, 2014 IEP was Inappropriate because Student's Attending School could not implement this IEP which required more than 15 hours of specialized instruction outside the general education setting; provided insufficient modifications and accommodations; contained inappropriate goals for Mathematics, Reading, Written expressions, Communication/Speech and Language, and Emotional, Social, and Behavioral Development, did not provide transportation, and no Behavior Intervention Plan (“BIP”) was developed.

Issue #4 – Whether Respondent denied Student a FAPE by failing to Provide Student with a Placement That Could Appropriately Implement Student's Inadequate February 12, 2014 IEP.

Issue #5 – Whether Respondent denied Student a FAPE because Student's 2013-2014 Educational Placement is Inappropriate and No Appropriate Placement Has Been Proposed for the 2014-2015 School Year

Issue #6 – Whether Respondent denied Student a FAPE because Student's November 14, 2013 and November 28, 2012 IEP Were Inappropriate because they provided insufficient modifications and accommodations; did not contain appropriate goals for Mathematics, Reading, Written expressions, Communication/Speech and Language, and Emotional, Social, and Behavioral Development, and no BIP was developed.

Issue #7 – Whether Respondent denied Student a FAPE by refusing to Permit an Independent Evaluator to Observe Student as Part of an Independent Educational Evaluation

RELIEF REQUESTED

Petitioner requests the following relief:

- (1) A finding of a denial of a FAPE on the issue(s) as stated in this Prehearing Order;
- (2) An Order that Respondent must provide Student with an immediate full-time special education placement and transportation to a nonpublic institution specializing in the education of students with learning disabilities, to be funded by DCPS;
- (3) An Order that Respondent must immediately create an appropriate IEP, reflecting Student's needs for a full- time special education placement for students with specific learning disabilities;
- (4) An Order for compensatory education;
- (5) An Order that Respondent must provide Petitioner's Educational Consultant access to observe Student in the classroom in order to allow him to complete the independent evaluation of educational needed prior to the hearing; and
- (6) Any other appropriate relief.

FINDINGS OF FACTS

After considering all of the evidence, as well as argument of counsel, this Hearing Officer's findings of facts are as follows:

- 1) Student _____ matriculated as a student at Attending School for the academic school years of 2012/2013 and 2013/2014. (Testimony of Petitioner, P-1, P-2)²
- 2) Student is a resident of the District of Columbia. *Id.* (P 20-1)
- 3) Student currently has an IEP and the primary disability is Specific Learning Disability. (P-1) Pursuant to the student's IEP with a meeting date of November 28,

² When citing to exhibits, the third range represents the page number within the referenced exhibit, in this instant, page 1.

2012, student receives 2.5 hours per week of specialized instruction inside the general education setting, 5 hours per week of specialized instruction outside the general education setting, and 4 hours per month of speech and language pathology outside the general education setting. (P-1) The Student's IEP with a meeting date of November 14, 2013, increased the student services to include 5 hours per week of specialized instruction inside the general education setting, 10 hours per week of specialized instruction outside the general education setting, and the speech and language services remained at 4 hour per month. (P-2). The Student's IEP with a meeting date of February 12, 2014, provided the student with 22.5 hours per week of specialized instruction outside the general education setting; speech and language services remained at 4 hours per month, and included 2 hours per month for behavior support services. (P-5). The Student's most recent IEP with a meeting date of June 26, 2014, only amended the transportation services provided to Student for extended school year program; all other services remained the same. (P-7).

- 4) Petitioner attended several IEP meeting regarding the Student. (Testimony of Petitioner, P-3, P-6) In the IEP meeting held on or about January 30, 2014, among other things, the team discussed the results of Student's hearing evaluation, which was normal; a review of the Student's results from the BASC-2, which found the Student's teacher's scores varied and one teacher found the Student to in the Clinically Significant range for Externalizing Problems and in the at-risk range for Internalizing Problems. And at-risk for hyperactivity and conduct and for depression. (P-3). Further, the same meeting, the Student's social worker added three behavior support goals, the Student's hearing was normal and her articulation and phonology

- show average speech skills, and pursuant to the Woodcock Johnson scores, the Student's standard scores are very low as compared to her peers. (P-3)
- 5) During the IEP meeting on or about February 12, 2014, the Student was progressing in mathematics, reading, written expression, communication/speech and language, and the Student was just introduced to the goals for emotional, social, and behavioral development. (R-4)
 - 6) Respondent completed the student's speech and language re-evaluation on December 15, 2011 and provide the report on January 30, 2012. (P-8).
 - 7) Respondent completed the student's comprehensive occupational therapy evaluation on December 30, 2013. P -30.
 - 8) Respondent completed the student's Confidential Initial Psychological evaluation on January 30, 2012 and the report was submitted on January 30, 2012. (P -10).
 - 9) Respondent completed the student's Behavior Screening on January 17, 2014 and the report was submitted on January 28, 2014. (P -13).
 - 10) Respondent completed the student's Speech and Language re-evaluation on January 28, 2014 and the report was submitted on January 30, 2014. (P -15).
 - 11) Respondent completed the student's Behavior Intervention Plan on February 10, 2014. (P -4, R-2).
 - 12) Respondent completed the student's Functional Behavior Assessment ("FBA") on April 14, 2014. (P -17).

CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. §1400(d)(1); *accord*, DCMR §5-E3000.1.

FAPE

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

special education and related services that -

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

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

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

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

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

Procedural Violations of IDEA

1. Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

20 U.S.C. §1414(f)(3)(E). *See also*, 34 C.F.R. §300.513(a); *accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (B.C. Cir. 2006).

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

BURDEN OF PROOF

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

Analysis

Issue #1 – Whether Respondent denied Student a Free and Appropriate Public Education (“FAPE”) by because Student Has Not Made Meaningful Educational Progress During the Statutory Period.

Petitioner claims that DCPS has denied Student a FAPE because the Student has not made meaningful educational progress in the past two years. I find that Petitioner has not met her burden of proof on this issue.

“[A]cademic progress is an ‘important factor’ among others in ascertaining whether the student's IEP was reasonably calculated to provide educational benefit.” *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 642 (8th Cir. 2003) citing *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034. *See, also*, *Iapalucci, supra*, 402 F.Supp.2d at 168 (Highly relevant whether student was making progress and experiencing meaningful educational benefit from the IEP.) Academic progress is

one of the “yardsticks” used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012)

Pursuant to Student’s IEP, the Student’s primary disability is Specific Learning Disability. Since the Student was determined eligible for special education services and the initial IEP was developed, the IEP progress reports on the annual goals show that the Student in progressing and even mastered one goal. (R-4) Specifically, the IEP Progress Report with a reporting period of August 27, 2012 to November 2, 2012 shows the Student was progressing in all reported goals, including math, reading, written expression, communication/speech and language. (R-4-24 to R-4-25) Further, the IEP Progress Report with an reporting period of January 26, 2013 to March 29, 2013, again shows the Student was progressing on all IEP goals and specifically states that Student is progressing in her ability to add and subtract, construct a complete sentence, and write a friendly letter. (R-4-18 to R-4-20) The Student’s IEP Progress Report with a reporting period of August 26, 2013 to November 1, 2013, again shows the Student in all of her IEP goals and even mastered the goal to improve her articulation of blends with the following sounds in the initial, medial, and final position of words with modeling with 80% accuracy: br/and /tr.(R-4-11 to R-4-14) Additionally, the Student’s IEP Progress report with a reporting period of January 27, 2014 to March 28, 2014, again shows the Student was progressing on all IEP goals. (R-4-1 to R-4-6) Furthermore, the Student’s special education teacher stated that the Student had progressed in the area of reading and math. (Testimony of Petitioner’s Special Education Teacher). I conclude therefore that DCPS did not deny Student a FAPE because the Student has not made meaningful educational p rogress d uring the statutory period.

Issue #2 – Whether Respondent denied Student a FAPE by failing to Comprehensively Re-evaluate Her.

Petitioner next claims that DCPS has denied Student a FAPE by failing to comprehensively re-evaluate the Student. I find that Petitioner has not met her burden of proof on this issue.

IDEA requires that a public agency must ensure that a reevaluation of each child with a disability is conducted, *inter alia*, when the child’s parent or teacher requests a reevaluation, subject to the limitation that a reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Once a reevaluation has been requested, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data, and on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child. *See* 34 CFR § 300.305(a); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46641 (August 14, 2006). The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student’s parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, *Herbin* concluded that “[r]evaluations should be conducted in a ‘reasonable period of time,’ or ‘without undue delay,’ as determined in each individual case.” *Id.* (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995)). *See, also, Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010). Importantly, the reevaluation commences with the review of existing data in accordance with 34 CFR § 300.305(a). *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007). After the review of existing evaluation data, additional assessments may be necessary if the IEP

Team and other qualified professionals determine that additional data are needed, or the parent requests an assessment, to determine whether the child continues to have a disability and to determine the educational needs of the child. *Id.* The public agency must obtain informed parental consent prior to conducting any additional assessments needed for a reevaluation. *Id.*

During the Student's IEP meeting, on or about November 14, 2013, Petitioner began notifying the Attending School of her concerns regarding the Student's behavior. (Testimony of Petitioner) Petitioner's School Psychologist testified credibly that Student began to have behavior problems mainly involving three specific students and she believed that Student is sensitive to fact that she cannot read, but further states that Student is a 'sweet girl' and gets along with most kids and adults. (Testimony of Petitioner's School Psychologist) Petitioner also testified that Student had been bullied at school and she had been suspended three times this school. (Testimony of Petitioner) Petitioner that requested an FBA during the December 5, 2013 IEP meeting and at the next IEP meeting on February 12, 2014, Respondent agreed to perform the FBA. (P-6). On or about February 28, 2014, Petitioner signed the required consent form to allow Attending School to began re-evaluating the Student. The Student's BIP was completed on February 10, 2014. (P-4, R-2). The Student's FBA was completed on April 14, 2014. (P-17). I conclude that Respondent did not deny the Student a FAPE by failing to comprehensively re-evaluate Student. In fact, Respondent conducted the requested re-evaluation of Student within a reasonable period of time and without undue delay. Respondent prevails on this issue.

Issue #3 – Whether Respondent denied Student a FAPE because the February 12, 2014 IEP was Inappropriate because Student's Attending School could not implement this IEP which required more than 15 hours of specialized instruction outside the general education setting; provided insufficient modifications and accommodations; contained inappropriate goals for Mathematics, Reading, Written expressions, Communication/Speech and Language, and Emotional, Social, and Behavioral Development, did not provide transportation, and no BIP was developed.

Petitioner asserts that Respondent's February 12, 2014 IEP denies Student a FAPE because the Student's Attending School could not implement this IEP which required more than 15 hours of specialized instruction outside the general education setting and it failed to provide sufficient modifications and accommodations and the IEP contained inappropriate goals for Mathematics, Reading, Written expressions, Communication/Speech and Language, and Emotional, Social, and Behavioral Development and the IEP did not provide transportation, and no BIP was developed. The IDEA requires that to provide a FAPE, "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). In this case, Petitioner has not raised a procedural issue with the development of the February 12, 2014 IEP. Therefore, I move directly to the second prong of the inquiry.

Further, 34 C.F.R. §300.324 require that in the development of the IEP, the IEP team must consider:

- (1) The strengths of the child;
- (2) The concerns of the parent for enhancing the education of their child;
- (3) The results of the initial or most recent evaluation of the child; and

(4) The academic, developmental, and functional needs of the child.

Furthermore, the minimum standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, “did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

I find that Respondent’s February 12, 2014 IEP meets the *Rowley* “basic floor of opportunity” standard because the Student progressed on all of her IEP goals. (R-4). Academic progress is one of the “yardsticks” used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012); *Hunter v. District of Columbia*, 2008 WL 4307492, 10 (D.D.C. Sept. 17, 2008), citing *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.*, 569 F.Supp.2d

371, 385 (S.D.N.Y. 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.”)

The IDEA requires that a Student’s IEP team revises the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general curriculum, the results of any reevaluation, information about the Student provided by the parents, the Student’s anticipated needs and other matters. *See* 34 CFR § 300.324(b). In addition, 34 CFR §300.321(a)(2)(i) requires the IEP Team, in the case of a student whose behavior impedes the student’s learning or that of others, to consider the use of positive behavioral supports, and other strategies to address that behavior. The evidence in this case shows that the Student’s IEP team meeting on or about January 30, 2014, the Student was progressing in mathematics, reading, written expression, communication/speech and language, and the Student was just introduced to the goals for emotional, social, and behavioral development. (R-4) Further, Respondent agreed to perform the FBA during the February IEP meeting and the FBA was completed on April 14, 2014. The IDEA requires that a child with a disability receive, as appropriate, a Functional Behavioral Assessment, and Behavior Intervention Plan and modifications that are designed to address the child’s behavior if the child’s behavior that gave rise to a disciplinary removal is a manifestation of the child’s disability. *See* 20 U.S.C. § 1415(k)(1)(F); 34 CFR § 300.530(f). Further, Respondent’s Social Worker testified that Student’s BIP was developed and the strategies were put in place, Student’s behavior improved. (Testimony of Respondent’s Social Worker). Further, Student participates in a six –week girl’s group at lunch where the group discusses personal hygiene, developing friends and this group includes both general education and special education students. (Testimony of Respondent’s Social Worker). The Social

Worker further reports that Student is not exhibiting negative behavior during this group. Id. I conclude that Respondent did not deny the Student a FAPE because the Student's Attending School could not implement this IEP which required more than 15 hours of specialized instruction outside the general education setting and it failed to provide sufficient modifications and accommodations and the IEP contained inappropriate goals for Mathematics, Reading, Written expressions, Communication/Speech and Language, and Emotional, Social, and Behavioral Development and the IEP did not provide transportation, and no BIP was developed.

Issue #4 – Whether Respondent denied Student a FAPE by failing to Provide Student with a Placement That Could Appropriately Implement the Student's Inadequate February 12, 2014 IEP; and

Issue #5 – Whether Respondent denied Student a FAPE because Student's 2013-2014 Educational Placement is Inappropriate and No Appropriate Placement Has Been Proposed for the 2014-2015 School Year

Petitioner further claims that Respondent denied Student a FAPE by failing to provide Student with Placement that could implement the Student's February 12, 2014 IEP, the Student's 2013/2014 Educational Placement was in appropriate, and no appropriate placement has been proposed for the Academic school year 2014/2015.

Under the IDEA, DCPS is obligated to match each child with a disability with a school capable of fulfilling the child's IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991). However, although the IDEA requires an appropriate education, it "does not require a perfect education." *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 328 (4th Cir. 2009). Instead, the child's program must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 525 (D.C.Cir.2005). It is therefore "highly relevant whether [the child] was making progress and experiencing meaningful

educational benefit” from his placement at City Elementary School. *See A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005).

The Student’s February IEP provided that Student would receive 22.5 hours a week of specialized instruction outside general education setting. (P-5-9) I find that Respondent’s Special Education Teacher testified credibly that Attending School was the appropriate placement for Student to receive such services. Respondent’s Special Education Teacher testified that he was providing Student with the 22.5 hours in his small classroom outside of general education setting. (Testimony of Respondent’s Special Education Teacher). However, the Special education teacher further stated that Student took her specials class, such as music, art, and gym with the general education students three days a week for one hour a piece. (Testimony of Respondent’s Special Education Teacher). There has not been a report of behavior problems with the Student in those specials classes. *Id.* More importantly, this same special education teacher is the teacher drafting the Student’s IEP Progress Report and keeping up with her test scores and the Student’s IEP goals and he reported the Student was making progress on her IEP goals as stated previously in this decision. *Id.* I conclude that Respondent did not deny the Student a FAPE by failing to provide the Student with a placement that could implement the required 22.5 hours of specialized instruction outside the general education setting as provided in the Student February 12, 2014 IEP and thus the Student’s placement at Attending School was appropriate for the 2013/2014 school year.

Further, Petitioner claims that Student has been denied a FAPE because Respondent has not proposed appropriate placement for the 2014/2015 academic school year.

Although the IDEA requires an appropriate education, it “does not require a perfect education.” *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 328 (4th Cir. 2009).

Instead, the child's program must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."

Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 525 (D.C.Cir.2005).

Respondent recommended two appropriate places for the Student's 2014/2015 academic school year – the Behavior Emotional Support ("BES") program at another District of Columbia School and the Learning Disability ("LD") program at Attending School. (Testimony of Petitioner, Testimony of Respondent's Program Manager). The Petitioner visited the BES program and was concerned that it was mostly male students and the program only enrolled students who were diagnosed as with emotional disturbed ("ED"). (Testimony of Petitioner). However, Respondent's Program Manager testified that the BES program had a maximum of 10 students, one teacher, one para-professional, and the students' disability range from ED, LD, and other health related. (Testimony of Respondent's Program Manager) However, in the alternative, Respondent recommended the LD program at Attending School as previously described in this section. (Testimony of Respondent's Special Education teacher and Program Manager).

Lastly, Petitioner introduced a third placement option for the Student's 2014/2015 academic school year, which would provide the Student with a fulltime placement. (Testimony of Petitioner's representative for placement). The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006)). "In determining the least restrictive environment, consideration is given to the types of services that the child requires." *Id.* (citing 34 C.F.R. § 300.552(d)). There was no evidence in this case that Private School, where Student

would have no interaction with non-disabled peers, is the least restrictive environment possible for Student. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 35 n.3 (D.D.C.2012) (Hearing Officer could consider whether private school was the least restrictive environment in evaluating whether private placement was the proper remedy.) I conclude that Petitioner has not shown that such private placement is appropriate and such placement is the Student least restrictive environment.

Issue #6 – Whether Respondent denied Student a FAPE because Student's November 14, 2013 and November 28, 2012 IEP Were Inappropriate because they provided insufficient modifications and accommodations; did not contain appropriate goals for Mathematics, Reading, Written expressions, Communication/Speech and Language, and Emotional, Social, and Behavioral Development, and no BIP was developed.

The IDEA requires that to provide a FAPE, “[t]he IEP must, at a minimum, ‘provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA’s procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). At issue here is the second prong.

Further, 34 C.F.R. §300.324 require that in the development of the IEP, the IEP team must consider:

- (1) The strengths of the child;
- (2) The concerns of the parent for enhancing the education of their child;

- (3) The results of the initial or most recent evaluation of the child; and
- (4) The academic, developmental, and functional needs of the child.

I find that Student's November 14, 2013 and November 28, 2012 IEPs meet the *Rowley* "basic floor of opportunity" standard because the Student progressed on all of her IEP goals as previously explained in this decision. (R-4). Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012); *Hunter v. District of Columbia*, 2008 WL 4307492, 10 (D.D.C. Sept. 17, 2008), citing *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.*, 569 F.Supp.2d 371, 385 (S.D.N.Y. 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.")

Further, IDEA requires that each child's IEP must include annual goals to enable the child to be involved in and make progress in the general education. *See* 34 CFR § 300.320(a)(2). Petitioner's Educational Consultant opined that the academic goals set out in the Student's November 14, 2013 and November 28, 2012 IEPs were inappropriate for Student because they did not contain any 'given statements' regarding the math and reading goals, which would show the specific areas the Student needed to improve. (Testimony of Petitioner's Educational

Consultant). However, IDEA does not require a ‘given statement.’ The Educational Consultant further opined that some of the math goals were not specific enough to determine what type of work Student was having difficulty with and stated that Student needed research-based intervention. (Testimony of Petitioner’s Educational Consultant). Respondent’s Special Education teacher testified that has been working with Student on her IEPs’ annual goals, testing, and providing the IEP progress reports as previously discussed in this decision. During the various IEP team meetings, the team had extensive discussions regarding the Student’s academic and behavior goals once introduced into Student’s IEP. Further, as previously addressed, per the IEP progress Reports spanning August 27, 2012 to March 28, 2014, showed the Student was making progress and mastered at least one IEP goal. I find that the IEPs’ goals for Student are not inappropriate. *See, e.g., Tice By and Through Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207-1208 (4th Cir.1990) (Court should not disturb an IEP simply because we disagree with its content. Rather, we must defer to educators’ decisions as long as an IEP provided the child “the basic floor of opportunity that access to special education and related services provides.” (quoting, *Rowley, supra* 458 U.S. at 201)); *T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.) I conclude that Respondent did not deny Student a FAPE because Student's November 14, 2013 and November 28, 2012 IEP Were Inappropriate because they provided insufficient modifications and accommodations; did not contain appropriate goals for Mathematics, Reading, Written expressions, Communication/Speech and Language, and Emotional, Social, and Behavioral Development, and no BIP was developed.

Issue #7 – Whether Respondent denied Student a FAPE by refusing to Permit an Independent Evaluator to Observe Student as Part of an Independent Educational Evaluation

Lastly, Petitioner claims that Respondent denied the Student a FAPE because DCPS refused to permit an independent evaluator to observe Student as part of an independent educational evaluation. I find that Petitioner has not met her burden of proof on this issue.

First, pursuant to IDEA, an independent educational evaluation is an evaluation conducted by a qualified examiner who is not employed by the district responsible for the child's education. 34 C.F.R. §300.502(a)(3)(i). While the definition of a “qualified examiner” is not defined in the statute, most courts have upheld rulings that school districts may impose the same criteria on independent evaluations as is required for evaluations completed on behalf of such school district. See *Humble Independent School District*, 48 IDELR 1449 (SEA Tex 2007) Petitioner’s Educational Consultant was found to not be trained as a Psychologist and he does not possess an such training that would enable him to conduct formal assessments. (Testimony of Petitioner’s Educational Consultant)

Second, parents always have the right to obtain an independent educational evaluation of their child at their own expense. 34 C.F.R. §300.502 (a)(1); 34 C.F.R. §300.502 (b)(3). Therefore, Respondent is not denying Petitioner the opportunity to have an independent educational evaluation, which as part of such evaluation, an observation of Student may be required. As such, Petitioner is welcomed to find a qualified examiner to observe Student. I conclude that Respondent did not deny Student a FAPE by refusing to permit an Independent Evaluator to observe Student as part of an Independent Educational Evaluation. Respondent prevails on this issue.

ORDER

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

- (1) All requested relief by Petitioner in this matter is DENIED.

IT IS SO ORDERED.

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 U.S.C. §1415(i).

08/25 /14

Dated

Christal E. Edwards /s/

Christal E. Edwards, Esq.
Hearing Officer