

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

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

OSSE  
Student Hearing Office  
December 20, 2013

<p><b>STUDENT<sup>1</sup>,</b> <b>By and through PARENT,</b></p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p><b>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</b></p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer: Charles M. Carron</p> <p>Date Issued:  December 20, 2013</p>
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**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND**

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

The DPC was filed November 14, 2013, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of Columbia Public Schools (“DCPS”).

On November 22, 2013, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

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

On November 22, 2013, Respondent filed a motion styled “District of Columbia Public Schools’ Motion to Dismiss Petitioner’s Administrative Due Process Complaint Notice and Notice of Insufficiency.”

On November 25, 2013, the undersigned was appointed as the Impartial Hearing Officer.

On November 26, 2013, the undersigned issued an Order severing the Notice of Insufficiency from the remainder of Respondent’s motion, denying dismissal of the DPC based upon Respondent’s assertion that it was insufficient on its face, and characterizing the remainder of Respondent’s motion as a motion for summary adjudication.

A Resolution Meeting was held on November 26, 2013 but it failed to resolve the DPC.

On November 27, 2013, Petitioner filed an opposition to the motion, styled “Response to Motion for Summary Judgment as Deemed by Hearing Officer.”

On November 29, 2013, the undersigned issued an Order granting in part and denying in part Respondent’s motion to dismiss.

The undersigned held a Prehearing Conference (“PHC”) by telephone on December 3, 2013, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by December 9, 2013 and that the Due Process Hearing (“DPH”) would be held on December 16, 2013.

The statutory 30-day resolution period ended on December 14, 2013.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on December 15, 2013 and will conclude on January 28, 2014.

No additional motions were filed by either party and the DPH was held on December 16, 2013 from 9:35 a.m. to 3:35 p.m. at the Student Hearing Office, 810 First Street, NE, Room 2006, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, the following documentary exhibits were admitted into evidence:

Petitioner's Exhibits: P-2 through P-14 and P-16 through P-23 <sup>2</sup>

Respondent's Exhibits: R-1 through R-17

Hearing Officer's Exhibits: HO-1 through HO-11

The following witnesses testified on behalf of Petitioner at the DPH: Petitioner and Educational Specialist.

The following witness testified on behalf of Respondent at the DPH: Social Worker B.

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

## **II. JURISDICTION**

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

## **III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT**

The circumstances giving rise to the DPC are as follows:

The Student is male, Current Age, and attends Current Grade at a public school (the "Attending School"). The Student has been determined to be eligible for special

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<sup>2</sup> Petitioner's proposed Exhibits P-1 and P-15 were excluded based upon Respondent's objections for the reasons stated on the record at the DPH. Respondent's objections to P-4, P-6, P-12, P-13, P-21 and P-22 were overruled for the reasons stated on the record at the DPH.

education and related services as a child with a disability, Emotional Disturbance (“ED”), under the IDEA.

Petitioner claims that Respondent has denied the Student a FAPE by providing him an inappropriate placement and by not providing the services specified in his Individualized Education Program (“IEP”).

#### **IV. ISSUES**

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

(a) Did Respondent deny the Student a FAPE because the IEP developed on or about October 10, 2013 provided an inappropriate placement, *i.e.* a placement not reasonably calculated to provide educational benefit, because the Student needs his hours of instruction to be provided predominantly in the outside general education setting with only a few hours of instruction in the general education setting?

(b) Did Respondent deny the Student a FAPE because the IEP developed on or about October 10, 2013 provided inappropriate related services, *i.e.*, related services that were not reasonably calculated to provide educational benefit, because the IEP did not include a Behavior Intervention Plan (“BIP”) or one-on-one counseling services on a daily basis?

(c) Did Respondent deny the Student a FAPE by failing to provide the related services that were specified in the Student’s IEP developed on or about October 10, 2013?

## V. RELIEF REQUESTED

Petitioner requests the following relief:<sup>3</sup>

- (a) a declaration that Respondent denied the Student a FAPE;
- (b) a declaration that Respondent violated the Student's due process rights under IDEA;
- (c) an Order that Respondent amend the Student's IEP;
- (d) an Order placing the Student, at Respondent's expense, at a non-public school to be specified by Petitioner's counsel in advance of the five-day disclosures<sup>4</sup>;
- (e) an Order of compensatory education, specifically tutoring and counseling to be specified by Petitioner's counsel in advance of the five-day disclosures<sup>5</sup>; and

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<sup>3</sup> In the DPC, Petitioner also requested a declaration that Respondent discriminated against the Student on the basis of his disability; however, the undersigned struck this request because a Hearing Officer in a DPC proceeding lacks jurisdiction over discrimination complaints. Petitioner also requested attorney's fees, which the undersigned struck because only a court of competent jurisdiction can award attorney's fees.

<sup>4</sup> No such school was specified by Petitioner in advance of the five-day disclosures and the undersigned precluded any testimony regarding such a school. Moreover, the non-public school witness called by Petitioner had not been disclosed by name in Petitioner's five-day disclosures, as required by the Prehearing Conference Summary and Order. In any event, as discussed *infra*, the Student's placement—which is predominantly in general education—is appropriate so a non-public special education school therefore would not have been appropriate for the Student. *See also, Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005); DC ST §38-2561; 20 U.S.C. §1412(a)(5)(A); DCMR §§5-E3011.1, E3013.1 and E3013.7; and 34 C.F.R. §300.114(a)(2).

<sup>5</sup> Because no such tutoring or counseling was specified by Petitioner in advance of the five-day disclosures, the undersigned precluded any testimony regarding compensatory education. Nevertheless, as discussed *infra*, a denial of FAPE requires a remedy, so the undersigned has had to craft an appropriate remedy based upon the documentary evidence.

(f) an Order that all meetings be scheduled through Petitioner's counsel.

## VI. FINDINGS OF FACT

### Facts Related to Jurisdiction

1. The Student is a male of Current Age. R-10-1.<sup>6</sup>
2. The Student resides in the District of Columbia. *Id.*
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with ED. *Id.*

### The Student's Medical Evaluations<sup>7</sup>

4. On April 22, 2010, Psychologist evaluated the Student to “provide insight into potential emotional, mental, and/or social issues that may interfere with his ability to perform adequately and appropriately in the classroom, and to assist the Multidisciplinary Team with the development of appropriate strategies for offering support.” P-10-1 [mis-numbered by Petitioner as PP 10]. Psychologist concluded that the Student's impulsive and hyperactive behaviors likely were linked to his previous diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”) and recommended consultation with a psychiatrist to evaluate medication. P-10-11. Psychologist concluded that the Student's emotional and behavioral issues affected his performance in the classroom, negatively

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<sup>6</sup> When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

<sup>7</sup> These evaluations are summarized because they provide background and context for the Student's October 10, 2013 IEP. In colloquy at the DPH, the undersigned noted that if Petitioner believes the Student should be reevaluated, Petitioner may make such a request to Respondent; however, failure to reevaluate is not an issue in the instant case.

affected his self-esteem and required immediate and intense intervention. *Id.* Psychologist determined that the Student met the criteria for Other Health Impair[ment] (“OHI”), ED and learning disability. Psychologist diagnosed the Student with Depressive Disorder, NOS [Not Otherwise Specified]; Learning Disorder, NOS; and ADHD, Combined Type. *Id.* Psychologist recommended “special education intervention,” supportive in-school therapy to help the Student explore and identify his emotions and learn to cope and problem-solve in effective and age-appropriate ways, “intense” therapy outside the school setting to address his poor coping resources, feelings of helplessness, low self-esteem and relationship with his father; and a mentor to help him improve in the areas of problem solving and social skills. P-10-11 and -12.

5. On May 6, 2010, Clinical Psychology Predoctoral Intern (“Intern”) evaluated the Student to assess his current level of intellectual and academic functioning. P-9-1 [mis-numbered by Petitioner as PP 9]. Intern found the Student’s general cognitive ability to be in the Low Average range, with his abilities to sustain attention, concentrate and exert mental control a weakness relative to his verbal reasoning abilities. P-9-9. Intern noted that the Student had significant deficits in correctly applying phonetic decoding rules when reading, generating words within a category, generating sentences to describe visual cues, combining sentences and composing an organized, persuasive essay. *Id.* Intern found that the Student’s personality functioning appeared to contribute to his inattention and school difficulties, and *vice versa*. *Id.* Intern attributed the Student’s emotional and behavioral difficulties to his inability to communicate his feelings adequately. *Id.* Intern considered the Student’s prior diagnosis of ADHD to be significant and noted that it might be contributing to his current emotional, behavioral

and academic functioning. *Id.* Intern recommended that the Student be considered to have a learning disability and/or OHI requiring special education support, a psychological evaluation and/or a psychiatric evaluation for ADHD and the need for medication, a clinical/psychological evaluation to assess how emotional and behavioral factors were having a negative impact on his ability to function in a general education classroom, and a Functional Behavioral Assessment (“FBA”) and Behavior Intervention Plan (“BIP”) to address targeted behaviors and help the Student increase participation and effectiveness in the classroom. P-9-9 and -10. Intern also recommended a curriculum broken down into small, manageable steps that the Student could understand and enjoy in order to sustain his attention, one-on-one interaction and/or “pullout” instruction to address his specific deficits, and supportive therapy to help him explore and identify his emotions and learn to cope and problem-solve in effective and age-appropriate ways. P-9-10.

6. On July 8, 2010, Psychiatrist evaluated the Student. P-8-1 [mis-numbered by Petitioner as PP 8]. Psychiatrist concluded that despite a previous diagnosis of ADHD, the Student’s reported inattention, disruptive behaviors, being overly playful and talkative, failing to complete schoolwork, and some aggression in school more likely were due to the impact of life events and increasing academic difficulties. P-8-4. Psychiatrist diagnosed the Student with “Conduct Disorder – Mild” and “Learning Disorder NOS.” *Id.* Psychiatrist recommended a school placement that provided individual and group therapy, a behavior plan, small class size, individualized instruction, peer tutoring, psychotherapy and family therapy. P-8-4 and -5.

The Student's May 9, 2013 IEP

7. The Student's May 9, 2013 IEP stated that the Student's disability affected his access to the general education curriculum in the following ways:

(a) In Mathematics, he required focus; he had the necessary skills to perform proficiently but could sometimes lack attention to detail, making careless mistakes because he was distracted or rushing. R-4-2.

(b) In Reading, he required detailed explanation and "rubrics" for all written assignments and the use of aids (dictionary, Thesaurus) to understand the meaning of unfamiliar vocabulary. R-4-3.

(c) In Written Expression, he required the use of aids (dictionary, Thesaurus) and pre-teaching of vocabulary in order to familiarize himself with letter-sound relationships. R-4-4.

(d) With regard to emotional, social and behavioral development, he needed to express his feelings verbally in a positive manner with an adult when feeling anxious or overwhelmed. R-4-5.

8. The Student's May 9, 2013 IEP stated that the Student's disability affected his progress in the general education curriculum in the following ways:

(a) In Mathematics, his lack of attention to detail could cause simple mistakes in his work, despite his content knowledge. R-4-2.

(b) In Reading, his failure to decode words appropriately could cause mistakes when answering comprehension questions. R-4-3.

(c) In Written Expression, his inability always to decode words appropriately caused mistakes in spelling and writing and affected his productivity in class. R-4-4.

(d) With regard to emotional, social and behavioral development, he had problems expressing the need for help, leading to inappropriate behaviors; although he had gained skills in how to cope and express his emotions in an appropriate and mature way, he needed to continue practicing these skills with adults, especially those in positions of authority. R-4-5.

9. The Student's May 9, 2013 IEP stated that he would receive 2.5 hours per week of specialized instruction in the general education setting, 90 minutes per month of behavioral support services in the outside general education setting (specifically, individual counseling sessions to address concerns with assertiveness) and 30 minutes per month of behavioral support services in the general education setting.<sup>8</sup> R-4-6 and -7.

#### The Student's June 17, 2013 FBA

10. An FBA was prepared June 17, 2013 by Social Worker A due to the Student's history of physical aggression, defiance and non-compliance that resulted in failing grades, behavior problems in Math and English classes and poor interpersonal relationships. R-5-1, -2.

11. Social Worker A reported that she could not conduct an analysis due to her inability to obtain information from a variety of resources including conducting classroom observations and interviewing the Student and the Parent. R-5-2.

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<sup>8</sup> Such services sometimes are referred to as "push-in" services because the provider comes into the general education classroom.

12. Social Worker A's only conclusion was that the Student was attempting "both to escape and gain attention from Adults." *Id.*

The Student's June 17, 2013 BIP

13. A BIP was prepared June 17, 2013 by Social Worker A, targeting the Student's following behaviors: maintaining self-control, following expectations within the school setting, and communicating/expressing his thought processes with a responsible adult. R-6-1.

14. The BIP identified the following strategies:

Teachers will provide student with specific step by step instructions into how to successfully complete all written assignments. If student shows frustration with completing his written assignments, teachers should verbally ask student if he needs assistance, and if at all possible at the moment, offer student individualized assistance. If he continues to exhibit difficulties, he should be directed to his case manager, dean of students, and/or the social worker.

*Id.*

15. The BIP stated that the Student would receive behavior support services as prescribed in his IEP "toward learning and implementing effective mood/behavior management strategies" and that when he demonstrated such skills, his efforts would be noted on a "behavior tracker" and considered toward earning incentives. *Id.*

16. The BIP stated that the Student would actively participate in the "SPARCS" behavior program. *Id.*

17. The BIP encouraged maintaining a "structured environment" to avoid exacerbating the Student's ED. *Id.*

18. The BIP stated that the Student's special education teacher would assist him one-on-one when completing academically challenging materials. *Id.*

19. The BIP stated that difficult tasks would be broken down into smaller tasks so as to avoid overwhelming the Student. *Id.*

20. The BIP recommended the use of positive verbal reinforcement, gentle prompting and encouragement to motivate the Student, while avoiding power struggles. R-6-1 and -2.

21. The BIP stated that school staff would collaborate with the Student and the Parent to identify support persons the Student could access when feeling distressed, overwhelmed and/or otherwise in need of a break. R-6-2.

22. The BIP described "daily behavior conduct sheets" that would be maintained and signed off on by school faculty and staff throughout the day and reviewed with the Student's case manager or behavior support worker weekly, with predetermined consequences and incentives to be utilized as "reinforcers." R-6-1 and -2.

#### The Student's Academic Progress as of October 2013

23. During School Year ("SY") 2012-2013, the Student passed all of his courses. R-15-1.

24. As of September 23, 2013, the Student had the following grades:

Advisory:	C
World History/Geography 2:	A
Honors English II	A
French I	D
Honors Geometry	D
Web Design	A
Honors Principals of Engineering	C
Biology I	D
Art and Design Foundations	A

R-8-2 and -3.

25. Petitioner testified that she believed the Student’s reported grades to be inflated and that he was failing all of his subjects. Testimony of Petitioner. Petitioner based her conclusion upon her review of the Student’s grades on individual assignments and tests in a database that apparently is available to parents. *Id.*

26. Petitioner believes the Student reads and spells below Current Grade level, that his reading comprehension and retention of information are “very low,” that he has problems focusing, that he needs to be redirected, and that he becomes frustrated if he does not receive help from a teacher when he asks. *Id.*

27. Petitioner did not testify to any specific grades the Student had earned on any specific assignments or tests, Petitioner acknowledged on cross examination that she was not familiar with all the components of the Attending School’s grading process, and Petitioner did not introduce into evidence any printouts from the database described in Paragraph 25 *supra*.

28. Based upon all of the record evidence and Petitioner’s burden of proof (*see*, Section VII *infra*) the undersigned finds that the Student’s grades reported by Respondent were an accurate reflection of his academic progress.

### The Student's Behavior as of October 10, 2013

29. The Student had two incidents of discipline during SY 2012-2013. Testimony of Petitioner. Specifically, he was sent home one day in November or December 2012 without any documentation of a suspension and returned to school the next day, and he had a one-day in-school suspension on January 30, 2013. *Id.*

30. There is no evidence of any discipline of the Student between January 30 and October 10, 2013.

31. At the Student's October 10, 2013 IEP Team meeting, one of the Student's teachers stated that he had problems with the Student's behavior in his classroom. Testimony of Petitioner.

### The Student's October 10, 2013 Eligibility Determination

32. On October 10, 2013, the Student's IEP Team determined that he continued to be a student with a disability—ED—who continued to need special education and related services. R-9-1.

33. The IEP Team determined that the Student's disability affected his participation in the general education curriculum in the areas of written expression and emotional, social and behavioral development. R-9-2.

34. The Parent agreed with the Eligibility Determination Report. R-9-4.

### The Student's October 10, 2013 IEP

35. The Student's October 10, 2013 IEP stated that the Student's disability affected his access to the general education curriculum in the following ways:

(a) In Written Expression, he continued to require the use of aids (dictionary, Thesaurus) and pre-teaching of vocabulary in order to familiarize himself with letter-sound relationships. R-10-3.

(b) With regard to emotional, social and behavioral development, his behavior impacted his social emotional functioning in the school setting; although he was able to discuss and provide insight into negative behaviors, he continued to need behavior support services to assist him with the ability to manage uncomfortable and distressing feelings. R-10-4.

36. The Student's October 10, 2013 IEP stated that the Student's disability affected his progress in the general education curriculum in the following ways:

(a) In Written Expression, his inability always to decode words appropriately continued to cause mistakes in spelling and writing and continued to affect his productivity in class. R-10-3.

(b) With regard to emotional, social and behavioral development, his difficulty expressing his emotions and complying with classroom rules had an adverse impact on his progress in the general education setting and he therefore required behavior support services in the form of group counseling and consultation with teachers and staff to assist his progress in emotional, social and behavioral development. R-10-4.

37. Educational Specialist<sup>9</sup> testified that the Student's October 10, 2013 IEP did not accurately or objectively reflect his Present Levels of Performance ("PLOPs") or his baseline skills, and she testified that it was inappropriate to develop the Student's annual goals without knowing "where he is academically." Testimony of Educational Specialist. She also criticized the goals in the October 10, 2013 IEP as being predominantly the same as the goals in the Student's IEP from SY 2012-2013. *Id.*

38. Upon examination by the undersigned, Educational Specialist acknowledged that in the absence of current evaluations, appropriate PLOPs and baselines she could not determine what goals were appropriate for the Student or what services he needed, *i.e.*, how many hours of specialized instruction, whether that instruction should be in our out of the general education setting, or what counseling services the Student required. *Id.* Accordingly, Educational Specialist's testimony regarding recommended placement and services for the Student was without foundation and has been disregarded by the undersigned.

39. The Student's October 10, 2013 IEP stated that he would continue to receive 2.5 hours per week of specialized instruction in the general education setting, 90 minutes per month of behavioral support services outside the general education setting (specifically, individual counseling sessions to address concerns with assertiveness) and 30 minutes per month of behavioral support services in the general education setting. R-10-5 and -6.

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<sup>9</sup> Educational Specialist was qualified, over Respondent's objection, as an expert in educational programming for children with disabilities. Respondent's counsel also took exception to Educational Specialist being able to testify to the appropriateness of the Student's IEP without knowing the Student, talking to his teachers, etc. While lack of familiarity with the Student affects the weight to be given to Educational Specialist's testimony, her expertise still permitted her to provide a critique of the IEP. In any event, as discussed *infra*, the undersigned has found the IEP to be appropriate, rendering the testimony of Educational Specialist moot.

40. Petitioner introduced no competent evidence that the Student required more hours of specialized instruction, or that he required specialized instruction outside the general education setting.

41. Based upon the entire record, the undersigned finds that the Student's October 10, 2013 IEP was reasonably calculated to provide educational benefit because he was making academic progress and not failing any classes, he had made academic progress with a similar IEP in the previous school year, he had not as of October 10, 2013, demonstrated any new problems or needs, and there is no record evidence that the Student required more hours of specialized instruction or specialized instruction outside the general education setting.

#### Implementation of the Student's June 17, 2013 BIP

42. Petitioner never received the BIP, the Student never discussed it with her, and she never received any "daily behavior conduct sheets" or other updates from the Attending School about the Student's compliance with the BIP. Testimony of Petitioner.

43. Respondent did not introduce into evidence any "daily behavior conduct sheets."

44. Social Worker testified that she provided the Student's BIP to his teachers and his case manager, but she could not recall when. Testimony of Social Worker.

45. For the reasons discussed in Section VIII *infra*, the undersigned has determined Social Worker's testimony not to be credible.

46. Social Worker admitted that she had not seen any "daily behavior conduct sheets" on the Student. Testimony of Social Worker.

47. Based upon all of the record evidence, the undersigned finds that the Student's BIP never was shared with his teachers and was not implemented.

48. The Student was suspended for two weeks beginning November 12, 2013, for allegedly assaulting a teacher on or about October 31, 2013.<sup>10</sup> Testimony of Petitioner.

49. The Student's Case Manager/Special Education Teacher called Petitioner regarding an incident with another teacher, stating that the Student had been disrespectful to the teacher who did not want him to return to her class.<sup>11</sup> *Id.*

50. For the three weeks preceding the DPH on December 16, 2013, Case Manager/Special Education Teacher has been hospitalized, causing "difficulties" with weekly meetings between Social Worker and teachers of students receiving services from Social Worker. Testimony of Social Worker.

51. There is no evidence in the record that a substitute or new case manager has been assigned for the Student.

52. The undersigned finds that the failure to implement the Student's BIP was material based upon all of the record evidence, in particular (a) the Student's IEP Team's conclusion that the BIP was necessary to address the Student's social-emotional problems and (b) in the absence of a BIP since October 10, 2013, the Student's two incidents of inappropriate behavior toward teachers, the more serious of which resulted in a two-week suspension.

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<sup>10</sup> As a result of this alleged assault, on November 8, 2013, the Principal of the Attending School sent Petitioner a Notice of Immediate Involuntary Transfer proposing to transfer the Student subject to an impartial hearing, if requested. R-12-1, P-2-3. Apparently this transfer never took place. In any event, the appropriateness of the proposed transfer is not one of the issues in this case.

<sup>11</sup> The teacher later informed Case Manager/Special Education Teacher that the Student "was doing better." Testimony of Petitioner.

Delivery of the Related Services Specified in the Student's October 10, 2013 IEP

53. On October 11, 2013, the Student was scheduled to receive 30 minutes of behavioral support services, in the form of group counseling, and he was at school that day; however, he failed to attend. R-14-2.

54. On October 18, 2013, the Student was scheduled to receive 30 minutes of behavioral support services, in the form of group counseling, but the school was closed. *Id.*

55. On October 25, 2013, the Student was scheduled to receive 45 minutes of behavioral support services, in the form of group counseling, but he forgot to attend. *Id.*

56. On November 1, 2013, the Student was scheduled to receive 30 minutes of behavioral support services, in the form of group counseling, but he was unavailable due to a meeting with the Dean of Students. R-14-3.

57. On November 8, 2013, the Student received 45 minutes of behavioral support services, in the form of group counseling. *Id.*

58. On November 15, 2013 and again on November 22, 2013, the Student was scheduled to receive 60 minutes of behavioral support services, in the form of group counseling, but did not attend because he was reported to have transferred to another school. *Id.*

59. The Student had not actually transferred to another school (Testimony of Petitioner; testimony of Social Worker) and the missed sessions were not made up (Testimony of Social Worker).

60. The Student was scheduled to receive 60 minutes of behavioral support services, in the form of group counseling, on November 29, 2013, but the school was closed for Thanksgiving. R-14-3.

61. The Student received group counseling on December 6, 2013. Testimony of Social Worker.

62. The Student did not receive any individual counseling between October 10, 2013 and the date of the DPH, December 16, 2013. *Id.*, Testimony of Petitioner.

63. The Student did not receive any counseling in the general education setting (*i.e.*, “push-in” counseling) between October 10, 2013 and the date of the DPH, December 16, 2013. Testimony of Social Worker.

64. Based upon all of the record evidence, the undersigned finds that Respondent failed to provide any of the behavioral support services in the Student’s October 10, 2013 IEP.<sup>12</sup>

65. The undersigned finds Respondent’s failure to provide the behavioral support services to be material<sup>13</sup> based upon all of the record evidence, especially (a) the IEP Team’s determination that the Student required 90 minutes per month of individual counseling and 30 minutes per month of push-in counseling to address his social-emotional problems, and (b) the Student’s suspension for the alleged assault of the teacher on or about October 31, 2013.

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<sup>12</sup> The undersigned finds that group counseling is not a substitute for individual counseling.

<sup>13</sup> The undersigned specifically finds that the failure to provide these services was material even disregarding the two-week period in November 2013 during which the Student was suspended.

## **VII. BURDEN OF PROOF**

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

## **VIII. CREDIBILITY**

The undersigned found Petitioner to be credible to the extent of her firsthand knowledge.

The undersigned found Educational Specialist to be credible to the extent of her firsthand knowledge and the extent of her professional expertise.

The undersigned found Social Worker not to be credible. She testified on direct examination twice that the Student's IEPs did not specify that the Student was to receive individual counseling. Upon redirect examination, Social Worker testified that she had provided the behavior support services set forth in the Student's October 10, 2013 IEP. However, when confronted by the undersigned with the specific words of the IEPs requiring individual counseling, Social Worker recanted. Similarly, on direct examination, Social Worker testified that to her knowledge the Student's BIP was being implemented but upon examination by the undersigned, Social Worker could offer no specifics as to when she notified anyone of the BIP and upon cross examination she admitted that she had not provided the BIP to Petitioner and that she had seen no behavior tracking forms indicating that the BIP was in fact being implemented. In short,

Social Worker’s testimony on material facts—under oath—was either deliberately false or recklessly indifferent to the truth.<sup>14</sup> Accordingly, the undersigned has given her testimony no weight when it conflicted with other evidence.

## IX. CONCLUSIONS OF LAW

### Purpose of the IDEA

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

### 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;

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<sup>14</sup> Respondent’s counsel, who had introduced the Student’s IEPs into evidence and therefore must have known or should have known that the IEPs required 90 minutes per month of individualized counseling, asked the questions on direct examination that elicited Social Worker’s false testimony that the IEPs did not require individual counseling. This raises a question as to counsel’s candor to the tribunal. *District of Columbia Rule of Professional Conduct 3.3*.

(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.

Contents of the IEP

3. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)).

4. The IDEA defines IEP as follows:

(i) In general The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

\* \* \*

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) 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

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and 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;

(IV) 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 for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) 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 subclause (IV)(cc);

(VI)

(aa) 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 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415 (m) of this title.

(ii) Rule of construction: Nothing in this section shall be construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

20 U.S.C. §1414(d)(1)(A).

5. To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child ... but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92

(D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982) (“Rowley”).

[T]he “basic floor of opportunity” provided by the Act consists of 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.

6. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) (“Academic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’”) (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student’s progress, courts should defer to the administrative agency’s expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (“Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP’s substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP

is appropriate simply because a teacher or other professional testifies that the IEP is appropriate ... . The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an “education ... designed according to the parent's desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ.*, Hawaii, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while “sympathetic” to parents' frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

*K.S. v. District of Columbia*, 113 LRP 34725 (2013).

7. Because the Student’s October 10, 2013 IEP was reasonably calculated to provide him with educational benefit based upon the information available to the IEP Team at that time (Finding of Fact 41), the undersigned concludes that the IEP was sufficient.

#### Provision of IEP Services During Suspension

8. If a child with a disability who violates a code of student conduct is suspended or otherwise removed from his current placement for *more than 10 school days* in a school year, the child must continue to receive “educational services” so as to enable the

child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP, and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 20 U.S.C. §1415(k)(1)(D), 34 C.F.R. §300.530(d).

9. "Educational services" are those provided in 20 U.S.C. §1412(a)(1) and 34 C.F.R. §300.101(a), *i.e.*, those services required to provide the child a FAPE. Thus, the specialized instruction and related services specified in an IEP must be provided during any suspension or other change in placement of *more than 10 school days* in a school year.

10. Because Respondent's failure to provide behavioral support services to the Student during the two-week period beginning November 12, 2013 occurred during a suspension of 10 or fewer school days, the undersigned concludes that Respondent was not required to provide services during that suspension.

#### Implementation of the IEP

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

12. Because Respondent's failure to provide any of the behavioral support services required by the Student's October 10, 2013 IEP was material (Finding of Fact 65) the undersigned concludes that Respondent denied the Student a FAPE.

## Compensatory Education

13. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) (“*Reid*”). That relief may include compensatory award of prospective services:

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

*Id.*

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

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

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

*Id.*

16. However, formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an “individually-tailored assessment”. *Stanton v.*

*District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (citing *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (internal quotation marks omitted).

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

18. In the instant case, Petitioner missed the deadline established in the Prehearing Conference Summary and Order for specifying the counseling and tutoring that Petitioner would seek as compensatory education. Accordingly, the undersigned did not permit testimony on Petitioner’s compensatory education request. However, Petitioner’s failure to justify a specific award does not waive the Student’s right to compensatory education. *Gill v. District of Columbia*, 751 F. Supp. 3d 104 (D.D.C. 2010); *see also, Henry v. District of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010).

19. The record in the instant case demonstrates that Respondent acknowledged the importance of individualized counseling to address the Student’s concerns with assertiveness. This is a sufficient basis for the undersigned to craft a compensatory remedy<sup>15</sup> for Respondent’s failure to provide any individualized counseling since October 10, 2013.

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<sup>15</sup> Even if the undersigned were to deny Petitioner a compensatory education remedy due to Petitioner’s failure to satisfy the requirements of the Prehearing Conference Summary and Order regarding pre-hearing disclosure of the specific counseling and tutoring sought, the undersigned would award the additional counseling services set forth in Section X, Paragraph 13 *infra* as a sanction for Social Worker’s untruthful testimony discussed in Section VIII *supra*.

## Summary

20. The Student's IEP developed on or about October 10, 2013 provided an appropriate placement, *i.e.* a placement reasonably calculated to provide educational benefit, because there is no record evidence that the Student needs his hours of instruction to be provided predominantly in the outside general education setting.

22. Respondent denied the Student a FAPE because the IEP developed on or about October 10, 2013 did not include a BIP and the BIP that Respondent had developed was not implemented.<sup>16</sup>

23. As of October 10, 2013, the Student did not require one-on-one counseling services *on a daily basis*; accordingly, the failure to include such services in the Student's IEP did not deny the Student a FAPE.

24. Respondent denied the Student a FAPE by failing to provide any of the related services that were specified in the Student's IEP developed on or about October 10, 2013, specifically, Respondent's failures to provide any individual counseling or "push-in" counseling were material.

## **X. ORDER**

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

1. No later than January 10, 2014, Respondent shall (a) identify a case manager for the Student who is actively at work (*i.e.*, not on leave or otherwise absent) (the "Case

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<sup>16</sup> Even if it is not Respondent's usual practice to include a reference to a child's BIP in the child's IEP, as asserted by Respondent's counsel at the DPH, the failure to include such a reference in the Student's IEP resulted in the BIP not being known to the Student's teachers and therefore not being implemented.

Manager”) and (b) notify Petitioner of Case Manager’s name, telephone number, facsimile number and email address. Such notification shall be provided to Petitioner via email to her last known email address and by telephone to her last known telephone number. If during the remainder of School Year 2013-2014, Case Manager is absent for more than five consecutive school days, Respondent shall identify a different case manager who is actively at work and notify Petitioner of a new Case Manager as described above.

2. Upon receipt of the notification(s) described in paragraph 1 above, Petitioner shall advise Case Manager of her preferred email address and telephone number, and Case Manager shall utilize that email address and telephone number unless and until advised by Petitioner of a different email address or telephone number.

3. No later than January 17, 2014, Case Manager shall (a) meet with each of the Student’s teachers in person, individually or in one or more groups, (b) provide each of the Student’s teachers a copy of the Student’s Individualized Education Program dated October 10, 2013 (the “IEP”) and Behavior Intervention Plan dated June 17, 2013 (the “BIP”), (c) explain to each teacher what his or her obligations are under the IEP and BIP, and (d) compose and have each teacher sign and date a statement that he or she has received and read the Student’s then-current IEP and BIP and understands his or her obligations under the IEP and BIP.

4. No later than January 23, 2014, Case Manager shall email to Petitioner a copy of the statements from the Student’s teachers described in Paragraph 3 above.

5. No later than the 15<sup>th</sup> of February, March, April, May, June and July of 2014, Case Manager shall email to Petitioner the Student’s daily behavior conduct sheets

maintained and signed off on by school faculty and staff for the preceding calendar month.

6. No later than January 10, 2014, Respondent shall identify one or more licensed social workers or psychologists responsible for providing behavioral support services to the Student (the “Counselor” or “Counselors”) and shall notify Petitioner of the name(s), telephone number(s), facsimile number(s) and email address(es) of the Counselor(s). Such notification shall be provided to Petitioner via email to her last known email address and by telephone to her last known telephone number. When identifying the Counselor or Counselors, Respondent shall take into consideration whether the Social Worker who has been providing group counseling services to the Student can effectively provide counseling services to him given her untruthful testimony in the Due Process Hearing in this case.

7. Upon receipt of the notification described in paragraph 6 above, Petitioner shall advise Counselor(s) of her preferred email address and telephone number and Counselor(s) shall utilize that email address and telephone number unless and until advised by Petitioner of a different email address or telephone number.

8. Counselor(s) shall provide 90 minutes per month of individual counseling and 30 minutes per month of “push-in” (*i.e.* in the general education setting) counseling to the Student for the remainder of School Year 2013-2014. If any counseling services are missed due to a school closing, testing, provider unavailability, student field trip or other activity, or the Student’s excused absence from school, those services will be made up by Respondent within the following five school days, or later if agreed to by Petitioner.

9. No later than the 15<sup>th</sup> of February, March, April, May, June and July of 2014, Counselor shall email to Petitioner all “Service Tracker” forms describing the counseling services provided to the Student in the preceding calendar month, including the services provided pursuant to paragraph 13 below.

10. Between February 24 and March 7, 2014, Respondent shall convene a meeting of the Student’s Individualized Education Program Team (“IEPT”) with all necessary members, including Petitioner, to review any new evaluations or assessments of the Student, the Student’s academic progress, behavior and any discipline since the last IEPT meeting, and any other concerns that Petitioner has expressed in advance of the meeting to Case Manager. The IEPT shall revise the Student’s IEP and/or BIP if and as appropriate, except that for the remainder of School Year 2013-2014, there shall be no reduction in hours of specialized instruction, individual counseling, or counseling in the general education setting, and the BIP shall not be rescinded.

11. Between April 22 and May 2, 2014, Respondent shall convene a meeting of the Student’s Individualized Education Program Team (“IEPT”) with all necessary members, including Petitioner, to review any new evaluations or assessments of the Student, the Student’s academic progress, behavior and any discipline since the last IEPT meeting, and any other concerns that Petitioner has expressed in advance of the meeting to Case Manager. The IEPT shall revise the Student’s IEP and/or BIP if and as appropriate, except that for the remainder of School Year 2013-2014, there shall be no reduction in hours of specialized instruction, individual counseling, or counseling in the general education setting, and the BIP shall not be rescinded.

12. The meetings described in Paragraphs 10 and 11 above shall be scheduled for a minimum of one hour and all necessary IEPT members must attend the entire meeting unless Petitioner and the Case Manager agree that the member(s) may be excused.

13. Beginning the week of January 13, 2014 and continuing through the week of February 17, 2014, Respondent shall provide or fund 30 minutes per week of individual counseling for the Student, in addition to the counseling provided in the Student's IEP. This counseling may be provided outside of instructional hours and/or at a location other than the school if mutually agreed by Petitioner and Respondent. If any of these counseling services are missed due to a school closing, testing, provider unavailability, student field trip or other activity, or the Student's excused absence from school, those services will be made up by Respondent within the following five school days, or later if agreed to by Petitioner.

14. From January 10, 2014 through the end of School Year 2013-2014, whenever the Student is scheduled for counseling services at school during the instructional day, Case Manager or Counselor shall, the school day prior to the scheduled counseling service, inform the teacher of the class the Student otherwise would attend at the time of the counseling service, that the Student is scheduled for counseling and request that the teacher remind the Student as necessary.

15. If despite being reminded pursuant to paragraph 14 above, the Student absents himself from scheduled counseling, any such session need not be made up by Respondent.

16. All written communications from Respondent to Petitioner concerning the above matters, including but not limited to the emails described in paragraphs 1, 4, 5, 6

and 9 above, shall include copies the same day to Petitioner's counsel by facsimile or email.

17. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

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

Dated this 20<sup>th</sup> day of December, 2013.

A handwritten signature in cursive script, appearing to read "Charles Carron".

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Charles Carron  
Impartial Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

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