DC Office of the State Superintendent of Education

Office of Review & Compliance
Student Hearing Office
1150 5th Street, S.E.
Washington, D.C. 20003

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CONFIDENTIAL

STUDENT[1], by and through Student's Parent Petitioners, v. DCPS Respondent.	HEARING OFFICER'S DETERMINATION Impartial Hearing Officer: Joseph Selbka

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

I. Introduction and Procedural Background

1. Student is a year old with multiple disabilities. Student is technically in Grade but reads and writes at a kindergarten level. Student has mild mental retardation (P-18-12,13). Student has multiple learning disabilities. *Id.* Student has dysthemia (a kind of depression). *Id.* Student's elgibility designation is multiple disabilities and has numerous services and accommodations.

2. The Circumstances which prompted this hearing was a claim that the 2011-2012 and 2012-2013 IEPS were inappropriate; the Student's triennial evaluation was inappropriate; and that the District had failed to provide a location of services for 2011-2012 school year and the 2012-2013 school year.

3. The parties agree that the complaint was filed on June 14, 2012. The undersigned was appointed hearing officer on June 18, 2012. A response was filed on June 26, 2012. The parties have conducted a resolution meeting on June 28 and July 2, 2012, while the thirty day timeline ended on July 14, 2012. The parties have not agreed to shorten or waive the resolution period. Accordingly, the parties agree that the 45-day timeline shall start to run on July 15, 2012. Accordingly, a final decision shall be due on August 28, 2012.

4. A prehearing conference occurred on July 13, 2012, which resulted in a prehearing order that issued on July 18, 2012. The hearing occurred on August 16, 2012 in Room 2005 of the Student Hearing Office. The Parent called four witnesses: Parent, Independent Psychologist, Educational Director, Educational Advocate. Parent Exhibits ##1-34 were admitted into evidence without objection. The District called no witnesses. District Exhibits ##1-4 were admitted without objection. Deborah Jacobson and Donna Wulkan represented the Parent. William Jaffe represented the District. The hearing was closed to the public. Closing arguments occurred, not closing briefs.

5. The due process hearing was held and a decision in this matter is being rendered, pursuant to 4 U.S.C.A. 1400 et seq., and its implementing regulations, 34 CFR 300 et seq. and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

II. Issues to be Decided

6. The issues raised by the Petitioner are:

Issue #1- Whether the Student's IEPs for 2011-2012 and 2012-2013 school years were appropriate. Specifically, Parent contends that the 2011-2012 and 2012-2013 IEPs were inappropriate because: the IEPs contained no measurable goals; assessment data was not linked to measurable goals; instructional services were not linked to measurable goals; the IEPs contained no behavioral intervention plan; the IEPs contained inappropriate present levels of performance.

Issue #2- Whether the District assigned Student to a location of services for the 2011-2012 school year and for the 2012-2013 school year.

Issue #3- Whether the District failed to comprehensively evaluate Student when Student was scheduled by regulation to be reevaluated.

III. Findings of Fact

7. Student reads and writes at a kindergarten level (P-18-8). Student also abuses cannabis and has been involved in numerous instances of criminal conduct (P-18-2). In 2012, Student has been charged with armed robbery and has pled guilty to intent to commit armed robbery and possession of a prohibited weapon (P-18-2). Student's psychological functioning has been determined to be so low so that he is incompetent to stand trial for the crimes which he has been accused of (P-19).

8. At the beginning of the 2011-2012 school year, Student was removed from the rolls at Options Charter School where he had been previously enrolled.[2] (Parent Testimony). Student is currently attending school at the the school run by the District at the District of Columbia's juvenile detention center (Parent Testimony).

9. Thereafter, Parent attempted to enroll Student at multiple District schools (Parent Testimony). Parent attempted to enroll Student at Schools (Parent Testimony). However, the schools all refused to enroll Student either because they could not implement Student's IEP or because the above stated schools were not Student's neighborhood school (Parent Testimony). There is no evidence that the District provided a location of services from September, 2011 to July, 2012 other than his time at the (Parent Testimony).

10. On July 12, 2012, the District offered a location of services (Anacostia School), but only would offer FAPE and an appropriate location of services after enrollment and 30 days of attendance at Anacostia (R2-2). There was no evidence that School was or is an appropriate location of services for this Student (i.e. a location of services which could implement Student's IEP).

11. Except for approximately 1 and ½ months which Student spent at Student has received no special education or related services for the 2011-2012 School Year (Parent Testimony).

Facts Related to Student's IEPs

12. Student's 2011-2012 IEP contained two reading goals and one writing goal (P-25-2,4). One of the reading goals (regarding reading and comprehending stories) is designed for a much more advanced student (Educational Advocate Testimony). Also, given the weakness of Student in reading and writing, Student should have more goals in reading and writing addressing every aspect of Student's disabilities in those areas- especially as to phonics (phonemic awareness) (Educational Advocate Testimony).

13. Student has no behavioral intervention plan (Educational Advocate Testimony) despite the District having completed a functional behavior assessment and a long record of behavioral problems in the classroom (Educational Advocate Testimony (P-25-5).

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[2] The District questioned the Parent extensively regarding the circumstances of Student's removal from Options Charter School. That issue is not in front of the undersigned (as the Parent confirmed at the prehearing conference), and Options Charter School is not in front of the undersigned. The undersigned will therefore not adjudicate that issue in any way.

14. Student's 2012-2013 IEP contained present levels of performance (approximately First or Second Grade) in reading whereas all other sources suggest Student is reading at a Kindergarten level (P-18; Educational advocate Testimony).

15. Student's 2012-2013 reading goals are designed for someone who is much more advanced than Student (Educational Advocate Testimony). Student's reading goal is focused on comprehending short stories (R-3) wherein Student still needs to learn how to consistently identify letters and read single words (Educational Advocate Testimony).

16. Similarly, the writing goal in the 2012-2013 IEP is similarly designed for a much more advanced student (Educational Advocate Testimony). Student is having difficulty writing single words, while the goal concentrates on having Student write sentences and summarize paragraphs (Educational Advocate Testimony, R3).

17. Student's present level of performance in the 2012-2013 IEP regarding Student's social and emotional status also should be more specific so as to be able to determine what social and emotional goals are necessary and achievable (Educational Advocate Testimony).

18. Student's social-emotional goals also need to be more specific. Student's goals related to following rules and regulations have to be more specific (Educational Advocate Testimony). Student also needs short-term goals moving gradually towards 100% attendance rather than demanding 100% attendance immediately (Educational Advocate Testimony).

19. Student's transition plan is designed for a student with much higher level of functioning than Student (Educational Advocate Testimony). The transition plan suggests Student (who can barely read single words and identify the letters of the alphabet) should be researching two year colleges (R3). The transition plan also does not address Student's functioning for independent living which is going to be necessary given Student's extremely low ability to function and reason (Educational Advocate Testimony).

Qualifications of Student's Witnesses

20. Student's Educational Advocate has a bachelor's and master's degree in special education (P-30-2). She has taught as a special education teacher and has also been an educational consultant and advocate for more than ten years (P-30). She has been in many roles on IEP teams in multiple states and is certified as a test administrator in the District of Columbia (P-30).

21. Student's Educational Advocate, in addition to her formal degrees and training, has had extensive experience in reviewing Student records and determining gaps in the records (Educational Advocate Testimony). Student's Educational Advocate, as part of her responsibilities since leaving teaching has worked on consulting, advocating at IEP meetings, and developing compensatory education plans (Educational Advocate Testimony).

22. Independent Psychologist who evaluated Student is a clinical psychologist and had spent six years as a school psychologist prior to taking her current position (P-28). Independent Psychologist also

had significant experience in the areas of clinical and school psychology both before and after receiving her doctorate (P-28). She is licensed as a clinical psychologist and was licensed as a school psychologist in Vermont (P-28). She has a doctorate, master's desgree, and bachelor's degree in clinical psychology (P-28).

23. Educational Director has a master's degree in special education and has been a special education teacher and administrator for many years (Educational Director Testimony). He is the assistant director of education at Youth in Transition School (Educational Director Testimony).

Facts Related to Student's Evaluations

24. Student was evaluated pursuant to a triennial evaluation in March, 2011 (P-17). The District's evaluation did not provide a vocational assessment; failed to evaluate Student's adaptive functioning, cognitive functioning; behavioral; and a social-emotional functioning. The evaluation also did not conduct a full psychological evaluation.

25. The District did conduct a functional behavior analysis which was completed in late 2010, or early 2011 (P-16).

26. The Educational Advocate testified that Student needs a vocational assessment, a social and emotional development assessment, a speech and language assessment, and an occupational therapy assessment (Educational Advocate Testimony) in order to determine the extent of Student's disabilities and ways to provide services for Student. The Educational Advocate also testified that Student needed a comprehensive psychological assessment to rule out selective mutism (Educational Advocate Testimony).

27. The District's own documents show that Student needs a comprehensive psychological assessment which has never been done (P-25-6). The District is also aware that Student exhibited symptoms of being on the autism spectrum (P-25-5); has significant social-emotional needs (R3, P-25-6,7); and has significant visual motor-integration problems (P-25-7).

28. The Educational Advocate testified that Student has numerous problems related to reception and expression (including selective mutism and being on the autism spectrum which can cause speech and language problems). As such, a speech and language evaluation would be necessary to determine Student's disabilities and the extent of those disabilities in the area of verbal expression (Educational Advocate Testimony).

29. The Educational Advocate testified that Student needs functional assessments to determine his life skills at this time and to prepare Student for independent living (Educational Advocate Testimony). While this ordinarily would not be necessary, Student's functioning at such a low level, the District needs to assess current performance in order to determine how to prepare Student for independent living (Educational Advocate Testimony).

30. The District provided no evidence as to what review was conducted as part of Student's 2011 reevaluation and what additional assessments were required (and/or not required) for Student to be comprehensively evaluated.

31. Student also needs an updated functional behavior assessment to deal with Student's pervasive truancy (Educational Advocate Testimony).

32. Student was also evaluated by Independent Psychologist (P-18) on May 2, 2012, in order to determine whether Student is competent to stand trial (Independent Psychologist Testimony). Independent Psychologist diagnosed Student for Dysthemia (a kind of depression); three learning disabilities (reading disorder, mixed receptive-expressive language disorder, and disorder of written expression); mild metal retardation; and cannabis abuse (P-18-12,13).

33. Independent Psychologist opined that Student would not be able to keep up with age-appropriate peers because of Student's low skill levels (Independent Psychologist Testimony). According to Independent Psychologist, Student should be able to read at the third or fourth grade level (Independent Psychologist Testimony).

34. Student's lack of skills in broad reading are attributable to his learning disability (Independent Psychologist Testimony). Moreover, direct instruction, tutoring, and accommodations could have allowed Student to read at a third grade level (Independent Psychologist Testimony).

35. Student's lack of skills also probably added to Student's depression and fear of school (Independent Psychologist Testimony).

Facts related to Student's Progress

36. Student has not made progress in reading or writing since 2007 (Educational Advocate Testimony).

37. Student has made some progress in math, however, he has not made a year's worth of progress in every school year (Educational Advocate Testimony).

38. Student's behavior has deteriorated since his grandmother's suicide approximately four years ago (Educational Advocate Testimony).

Facts Related the Parent's Proposed Private Location of Services, Compensatory Education, and Other Remedies

39. At the hearing, the Parent stipulated that she seeks no remedy for the time Student spends at the and seeks an order for Student's placement and location of services only for after Student is released from (Closing Argument Admission).

40. The Assistant Director of Education at Private Placement") testified at the hearing (Educational Director Testimony). Educational Director testified that Private Placement has many similar students to Student; that Private Placement can provide Student with an

educational benefit; that Private Placement can provide students with multiple disabilities (including emotional disturbance and students with speech and language disabilities) with needed services; that Private Placement can provide Student with vocational and life skills training; and can provide Student with needed related services (including "wrap around" services) (Educational Director Testimony).

41. Private Placement has and will place Student in a self contained classroom at first because of the additional support and in order to provide extensive individualized instruction in phonetics and grammar (Educational Director Testimony). There are five students and two educational professionals in the self contained classroom in addition to 1:1 support (Educational Director Testimony).

42. Private Placement can provide Student with extensive therapy (including group and individual therapy) ; occupational therapy, and speech and language therapy (Educational Director Testimony).

43. Private Placement has provided services to students who are as low functioning as Student in regard to reading and writing (Educational Director Testimony).

44. Private Placement also has a behavior management plan for students based upon a points system (Educational Director Testimony).

45. The Educational Advocate testified that she was not aware of any program at any DCPS school which could address Student's needs (Educational Advocate Testimony). The Educational Director testified that There was no District evidence to the contrary.

46. Student is going to need tutoring as compensatory education which is flexible (Educational Advocate Testimony). Because Student will be adjusting to a new school, the compensatory education provider must be able to determine his needs and adjust Student's tutoring to what he is learning in school (Educational Advocate Testimony). Having the compensatory education match what Student is learning in school will also aid Student's confidence.

47. Student also needs a therapeutic component to the academic tutoring in order to increase Student's self esteem and confidence in completing school work (Educational Advocate Testimony).

48. Student needs approximately 120 hours of therapeutic tutoring and 60 hours of mentoring in order to address the District's failure to provide FAPE (Educational Advocate Testimony). This is the amount, in the Educational Advocate's opinion, necessary to compensate for District failures to provide special education and related services for most of the 2011-2012 school year (Educational Advocate Testimony).

49. Student also needs life skills training to make up for the lack of a transition plan implementation for an academic year (Educational Advocate Testimony).

IV. Conclusions of Law

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

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

52. In determining whether a placement is proper under IDEA, the hearing officer does not need to defer to the party witnesses. *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990)(hearing officer characterized as having specialized expertise in special education and special education law); *See also School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167 (7th Cir. 1994)(hearing officer characterized as expert witness in determining whether placement is proper). A hearing officer can thus use his/her expertise to determine an appropriate placement for the student. *Id.*

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

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

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

56. Expert opinions are admissible if the experts are considered qualified through either training or experience. *Jenkins v. United States,* 307 F.2d 637 (D.C. Cir. 1962). To the extent the hearing officer

relies upon expert opinions, the expert opinions must be inferred ultimately from facts in the record, and the inferential process by which an expert reaches his/her conclusions must be fully explained. *Giant Food Stores, Inc. v. Fine*, 269 F.2d 542 (D.C. Cir. 1960) (expert testimony must be grounded by material facts in the record); *The Nereide*, 9 Cranch 388 (1815) (in litigation, witnesses must testify as to the train of their inferential reasoning).

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

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

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

60. The IDEA also requires a decision based upon substantive grounds based on whether a child received FAPE. 20 U.S.C.A. 1415(f)(3)(i); *A.G. v. District of Columbia.* 57 IDELR 9, 794 F.Supp.2d 133 (D.D.C. 2011). This requirement imposes upon all administrative hearing officers the obligation to structure the hearing so as to properly make an administrative record. *Id.* As in most state administrative proceedings, District of Columbia impartial hearing officers have the power not only to listen to evidence presented by the parties, but to affirmatively find facts necessary to properly to determine which party should prevail under the law. *A.G., supra, Gill v. District of Columbia,* 751 F.Supp.2d 104 (D.D.C. 2010) (the educational needs of a special needs child cannot be forfeited by poor lawyering and an incomplete record); *See also,* Frank Cooper, State Administrative Law, Vol. 1, Bobbs-Merrill Company, Inc. (1965), pg. 336 .

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

Conclusions Related to IEP Design

61. Student is entitled to an IEP designed to provide a Free Appropriate Public Education ("FAPE"). FAPE is defined as an educational placement reasonably calculated to provide Student with an

educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley,* 458 U.S. 176 (1982). The District need not provide a program designed to maximize Student's educational potential. *Id.* Rather, the District only needs to provide a program designed to produce substantial educational progress. *Id.*

62. An IEP team must thus develop an IEP which is reasonably calculated to provide the student with an educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley,* 458 U.S. 176 (1982); *T.H. v. District of Columbia,* 52 IDELR 216, 620 F.Supp.2d 86 (D.D.C. 2009). *Hunter v. District of Columbia,* 51 IDELR 34 (D.D.C. 2008). To do so, the IEP must be reasonably calculated to produce progress, not regression or trivial academic advancement. *M.B. v. Hamilton Southeastern Schools,* 668 F.3d 851 (7th Cir. 2011).

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

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

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

66. Thus, in order to provide substantive FAPE, an IEP must establish goals which respond to all significant facets of a student's disability, both academic and behavioral. *Sarah D., supra.* When a student has a learning disability, the goals must address the student's learning disability. *Pennsbury School District,* 48 IDELR 262 (PA SEA 2007).

67. A District must address all of a student's unique social-emotional needs like low self-esteem, anxiety, lack of trust, and depression with specific goals and short term objectives/benchmarks. *Sarah D., supra; Los Angeles Unified School District,* 39 IDELR 257 (Cal. SEA 2003). A District must have goals which directly address a child's unique needs and feelings/behaviors. *Id.*

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

69. Each IEP goal should correspond to some item of instructions or services identified in the IEP. *Burlington School District,* 20 IDELR 1303 (SEA VT 1994).

70. An IEP that lacks meaningful educational goals is likely to be fatally defective. *Susquentia School District v. Raelee S,* 25 IDELR 120 (M.D. Pa. 1996). It is very difficult (and nearly impossible) to appropriately address a student's needs without first defining the goals which will provide a reasonable educational benefit. *Conemaugh Township School District*, 23 IDELR 1233 (SEA PA 1996).

71. The goals should be specific enough for the providers and the IEP Team to determine whether a student is making educational progress and should contain evaluative criteria so that an IEP Team can objectively determine whether progress is being made. *In Re Student with a Disability,* 50 IDELR 236 (SEA NY 2008); *Anchorage School District,* 51 IDELR 230 (AK SEA 2008). The goals cannot be so inexact or subjective so as to blur whether a child is making objective educational progress. *Id.* The goals should be specific enough to allow educators to address instructional plans for the student. *Board of Education of Rondout Valley Central School District,* 24 IDELR 203 (SEA NY 1996).

72. Students must also be prepared for a transition to adulthood and be prepared for employment and independent living. 20 U.S.C.A. 1414(d). For children who reach age 16, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. 34 CFR 300.320(b).

73. A Student's IEP must contain a statement of the child's present levels of academic achievement and functional performance including how the child's disability affects the child's involvement and progress in the general education curriculum. 34 CFR 300.320(a)(1). The statement of present levels must be accurate so that the IEP Team can use the present levels as a baseline for developing goals, measuring future progress, and designing educational programming. *Bakersfield City School District,* 51 IDELR 142 (SEA CA 2008). The present levels must be all-encompassing so as to provide a baseline that reflects the entire range of the child's needs both academic and nonacademic. 34 CFR 300.324(a). The statement should encompass a student's needs, strengths, interests, and learning style. *Id.* In order to fully comply with the pertinent regulation, the statement should include: the child's academic achievement level; testing scores and an evaluation of scores; the child's physical and psychological condition including any physical impairment which could affect instruction; the child's emotional maturity, self-help skills, social adaptation, functional behavior, and development; and a statement of the child's prevocational and vocational skills. *Id.* "Functional" generally refers to the student's ability to undertake routine activities associated with everyday living. 71 Fed.Reg. 46661 (2006).

74. If a statement does not consider the unique needs of a student, establish a baseline for establishing goals, or allow informed parental participation in the IEP process, then the IEP may deny the Student FAPE. *Freidman v. Vance,* 24 IDELR 654 (D. Md. 1996); *Portland Public Schools,* 24 IDELR 1196 (SEA ME 1996); *Conemaugh Township School District,* 23 IDELR 1233 (SEA PA 1996).

75. A behavioral intervention plan contains accommodations and/or related services which must be and are (whether the school district calls it such or not), part of the student's IEP. 34 CFR 300.324(a)(2). Generally, a BIP is designed after a functional behavior assessment has been conducted. A functional behavior assessment, when not required by disciplinary removals, is an evaluation governed by the regulations and IDEA statutory sections on evaluations. 34 CFR 300.304(b)(1), 300.305(a)(2)(iv). *Harris v. District of Columbia,* 561 F.Supp.2d 63 (D.D.C. 2008).

76. Failure to design an IEP with an appropriate BIP can be a denial of FAPE like any other design failure in an IEP. *Neosho R-V School District v. Clark,* 38 IDELR 61, 315 F.3d 1022 (8th Cir. 2003). Similarly, failure to properly implement a BIP can be a denial of FAPE as any other failure to implement a section of an IEP. *Burke v. Amherst School District,* 51 IDELR 220 (D.N.H. 2008).

Conclusions of Law Related to an Appropriate Location of Services

77. The District has a responsibility to provide special education and related services to every child with a disability who is a resident of the District- whether the child is actually enrolled at a neighborhood school or not. *D.S. v. District of Columbia,* 54 IDELR 116 (D.D.C. 2010); *District of Columbia v. West,* 54 IDELR 117 (D.D.C. 2010). A District cannot condition the provision of FAPE upon re-enrollment of the District. *Id.*

78. The District has a responsibility to have an IEP capable of providing FAPE to students at the beginning of each school year, 34 CFR 300.323(a).

79. While a district generally has discretion to choose a location of services to provide special education to a child, a location which cannot implement large portions of the child's IEP amounts to a change of placement, a material failure of implementation of the IEP, and denial of FAPE. *Lunceford v. District of Columbia Board of Education,* 745 F.2d 1577 (D.C. Cir. 1984); *Savoy v. District of Columbia,* 844 F.Supp.2d 23 (D.D.C. 2012).

80. Similarly, a complete failure to provide any location of services is a change of placement, a material failure of implementation of the IEP, and a denial of FAPE. *Id.*

Conclusions of Law Related to Failure to Evaluate

81. The District has the responsibility to conduct a full and individual initial evaluation in accordance with pertinent regulations before the provision of special education and related services. 34 CFR 300.301(a). An appropriate evaluation is one which complies with the pertinent federal and state regulations. *Hawkins v. District of Columbia,* 539 F.Supp.2d 108 (D.D.C. 2008); *Kruvant v. District of Columbia,* 2005 WL 3276300 (D.D.C. 2005).

82. An evaluation must assess a student in all areas related to the suspected disability, 34 CFR 300.304(c)(4); and be sufficiently comprehensive to identify all of the Student's special education and related services needs, whether or not linked to the disability category(ies) in which the child has been classified. 34 CFR 300.304(c)(6).

The District's evaluation must be "comprehensive" to be appropriate. 34 CFR 300.304(c)(6). This means that the District must evaluate: (1) all areas of disability or suspected disability; (2) to the extent necessary to identify the needs of the child to special education and related services. 34 CFR 300.305(a)(2)(i)(A). As part of determining the nature and extent of the special education services and related services a child needs, the School District must determine the extent of the student's disability. *In Re Yuba City (CA) Unified School District*, 22 IDELR 1148 at 4 (OCR 1995)(in determining whether evaluation under Section 504 complaint was adequate, School District failed to properly evaluate Student by not determining the extent of the disability- Section 504 evaluation standards are essentially the same as evaluation standards under IDEA see e.g. 34 CFR 104.35). The District must determine the cause of Student's behaviors to the extent necessary to classify Student's disability(ies) as defined by IDEA and provide Student with special education and related services. 34 CFR 300.301(c)(2). The District must conduct assessments necessary to allow the IEP Team to properly determine the content of Student's IEP. 34 CFR 300.304(b)(1)(ii), 304(b)(7).

83. In evaluating a student, the district must also consider: (1) the present needs of the child; (2) whether the child needs special education and related services; and (3) whether any modifications or accommodations are required. 34 CFR 300.305(a)(2)(i)(B)(i-iv).

84. During an evaluation, the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. 34 CFR 304(b)(1). Moreover, a school district must properly administer tests it does use to evaluate students. 34 CFR 300.304(b)(3),(c)(iii), (c)(iv). The District is not allowed to use any single measure or assessment as the sole criterion for whether a student has a disability. 34 CFR 300.304(b)(2).

In addition, during an evaluation, the District must review existing evaluation data on the child, evaluations and information provided by the parents; current classroom based assessments and classroom based observations; and teacher and service provider observations. 34 CFR 300.305(a)(1)(i-iii). The School District must then determine what additional data, if any, is needed to determine whether the child has a disability; the needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child continues to need special education and related services and whether additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP. 34 CFR 300.305(b).

85. The District must also choose assessments which are selected and administered so as not be discriminatory on a racial or cultural basis. 34 CFR 300.304(c)(1)(i). The assessments must be provided in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer. 34 CFR 300.304(c)(1)(ii), (c)(3). The assessments must be administered by trained and knowledgeable personnel; used for the purposes for which the assessments are valid; and are administered in accordance with any instructions provided by the producer of the assessments. 34 CRF 300.304(c)(1)(iii-v).

86. The District must administer assessments which assess specific areas of educational need and not merely to provide a single general intelligence quotient. 34 CFR 3300.304(c)(2).

87. Although the School District must evaluate properly and according to the OSEP regulations, hearing officers are entitled to make a finding against the District only if the procedural inadequacies impeded the Student's right to a free appropriate public education or denied the student some educational benefit. 20 U.S.C.A. 1415(f)(E)(ii)(I-III); *Taylor v. District of Columbia,* 770 F.Supp.2d 105 (D.D.C. 2011).

88. There are additional requirements for evaluating students suspected of having a specific learning disability. 34 CFR 300.307-310. The additional requirements relevant to this case are set out below.

89. The determination of whether a student has a specific learning disability must be made by the child's parents and a team of qualified professionals including the student's regular teachers and a person qualified to conduct individual diagnostic examinations such as a school psychologist. 34 CFR 300.308. The group may determine that the student has a specific learning disability if the student is not achieving adequately; is not making progress in response to research based interventions; or the child exhibits a pattern of strengths and weaknesses which indicate the existence of a specific learning disability. 34 CFR 300.309. The school district must ensure that a student is observed in the learning environment to document academic performance and behavior in the areas of difficulty and use the observed information to determine whether the student has a specific learning disability and the extent of that disability. 34 CFR 300.310.

Conclusions Related to Parents' Remedies

90. If there is proof of failure to provide FAPE, the undersigned must provide declaratory relief and compensatory relief to make the child and the parents whole. *A.G. v. District of Columbia,* 57 IDELR 9 (D.D.C. 2011). The ultimate relief depends upon the equitable factors in each individual case. *Branham v. District of Columbia,* 427 F.3d 7 (D.C. Cir. 2005).

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

92. The undersigned is also entitled to place a student in a private placement/location of services as compensatory education or if the equities of a situation require such a finding when a district failed to provide a student with FAPE. *Branham v. District of Columbia,* 44 IDELR 149, 427 F.3d 7 (D.C. Cir. 2005). See also *Draper v. Atlanta Independent School System,* 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008).

93. In making decisions to award a prospective placement at a private locations of services, the undersigned must weigh the equitable factors in each case including: whether a particular placement is appropriate for the student; the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost; and the extent to which the placement represents the least restrictive environment. *Branham, supra.* The conduct of the parties is also an equitable factor in determining whether a prospective placement is proper. *Id.*

V. Discussion (Including Inferences, Credibility Findings, and Application of Fact to Law)

94. The undersigned makes a credibility finding in favor of Parent that she tried to enroll Student in multiple schools at the beginning of the 2011-2012 school year based upon the lack of any evidence to the contrary.

95. The undersigned finds that, regardless of enrollment, the District had a duty to provide special education to Student, and the District did not do so. Relatedly, the undersigned finds that the District never provided a location of services to Student for receiving special education until Student was in the The undersigned therefore finds that the District failed to provide any special education and related services for the 2011-2012 school year (except for Student's time at the

96. Based on the above stated findings, the undersigned finds that the District failed to implement Student's IEP by failing to assign a location of services and changed Student's placement by failing to assign a location of services. The District therefore denied Student FAPE on this basis.

97. The undersigned finds that the District failed to provide a location of services for the 2012-2013 school year. Even up to the resolution meeting the District insisted on an illegal condition to providing special education services-- demanding enrollment at a location of services (which might or might not be appropriate) prior to even trying to place Student at an appropriate location of services.

98. Based upon the testimony of Educational Director, the lack of any testimony to the contrary, the undersigned finds that Private Placement is an appropriate location of services for Student to receive special education and related services.

99. The undersigned makes a credibility finding in favor of the Educational Advocate as to her testimony regarding: the failure of the District to provide appropriate goals; the failure of the District to provide proper present levels of performance; the lack of a behavior intervention plan; and the failure to properly evaluate Student. The undersigned rejects the District's argument that because the Educational Advocate may get a contract at some point for compensatory education for Student, that her testimony is inherently incredible.

100. In light of the above stated credibility finding; the lack of any evidence to the contrary; Student's clear lack of progress in reading and writing; and Student lack of progress in functional behavior and day-to-day living; the undersigned adopts the inferences of Educational Advocate regarding the IEP's design flaws in regard to goals; present levels of performance; and lack of a behavior intervention plan.

Similarly, the undersigned adopts the opinions and inferences of the Educational Advocate as to the lack of comprehensiveness of the District's evaluations. Specifically, the District failed to conduct evaluations necessary to determine the extent of Student's disabilities and/or necessary to determine the needs of Student for special education and related services.

101. The undersigned therefore finds that the Student's IEPs for the 2011-2012 and 2012-2013 school years were and are fatally defective due to inappropriate goals (in reading, writing, and social-emotional functioning; and life skills); inaccurate present levels of performance; and a lack of a behavioral intervention plan. Because the goals in question were so vague and generally inappropriate, they, by definition, could not be linked to assessment data or instruction.

102. The undersigned therefore finds that the two IEPs contained inappropriate present levels of performance; inappropriate goals in reading and writing; and inappropriate goals as to Student's transition services (as described in the facts above).

103. The undersigned further adopts the opinion of the Educational Advocate that it will require 120 hours of therapeutic tutoring and 60 hours of mentoring to compensate Student for lost educational opportunity arising from the District's many denials of FAPE. The undersigned relies upon the explanation of the Educational Advocate as to how this compensatory education regime will compensate Student for lost educational opportunity. In considering this award, the undersigned considers the conduct of the parties (specifically the behavior of the District in failing to provide Student with services for nearly an entire school year); the nature and severity of Student's disabilities as described in the facts section above; the link between Student's needs and the services suggested as testified to by Educational Advocate.

104. The undersigned finds that the equitable factors require an award of a private location of services. First, the District presented no evidence that it would ever provide Student services except upon requiring an illegal condition to do so (enrollment at a random location of services which might or might not be appropriate for Student). Second, the District presented no evidence that there was a public school which could implement Student's IEP. Third, the District provided no equitable reason of any kind why a private location of services shouldn't be awarded in light of the District's consistent refusal to provide FAPE to this Student. Finally, the YIT-Private Placement is appropriate for this Student as testified to by Educational Director given the needs of Student and the services offered by the Private Placement. Although the District complained of the cost of a private placement, it provided no evidence of the cost of the -Private Placement.

105. The undersigned finds that the failure to comprehensively evaluate Student caused the denial of an educational benefit to Student. To wit, the evaluations were and are necessary to accurately determine Student's present levels of performance and accurate present levels of performance are necessary to formulate appropriate goals. Appropriate goals (both generally and in this case) are necessary to reasonably calculate how to provide FAPE for Student.

106. The undersigned finds that Student need appropriate goals in reading and writing; social-emotional functioning; adaptive functions; and in regard to transition services; and appropriate present levels of performance to obtain FAPE.

VI. Order

107. The District has failed to appropriately evaluate Student; the Student's IEP is found to be inappropriate based upon inappropriate goals and inaccurate present levels of performance and no behavioral intervention plan. The District also failed to place Student in an appropriate location of services for two school years (2011-2012; 2012-2013). The undersigned finds for the Parent on all issues.

108. Within seven days of Student being released from (or seven days of issuance of this order if Student has already been released from as of issuance of this order), the District shall issue a prior written notice placing Student at School as his location of services for the 2012-2013 school year. The District shall pay for the private location of services.

109. Within fourteen days of this order, the District shall begin to conduct: a comprehensive psychological evaluation; a social-emotional evaluation; an updated functional behavior assessment to address Student's pervasive truancy; an occupational therapy assessment; a speech and language assessment; an adaptive functioning assessment; a vocational assessment; and a cognitive functioning assessment. All assessments must be completed within forty-five days of this order.

110. Within fourteen days of completion of all assessments required by this order, the IEP Team shall meet to consider the results of the evaluations ordered by this HOD. The IEP Team shall reconsider and develop appropriate present levels of performance for Student and appropriate goals in reading, writing, functional development, social emotional development, and transition services. The reading and writing goals must address all aspects of Student's learning disability. The goals must be connected to assessment data and instructional services must be linked to the newly developed goals. The goals must be measurable. Student's IEP shall be revised to reflect the revised goals and revised present levels of performance.

111. Within twenty- one days of this order, the District shall complete a behavior intervention plan for Student. When the updated functional behavior assessment required by this HOD is available, the District shall update the behavioral intervention plan within twenty-one days of the completion of the updated functional behavior assessment.

112. School may implement the current 2012-2013 IEP until the revised IEP is available.

113. The District shall provide 120 hours of therapeutic tutoring for Student within seven days of this order. "Therapeutic tutoring" will take the form of academic tutoring, life skills training, therapeutic mentoring, life skills training, and behavioral and social-emotional support. The District shall thereafter provide an additional 60 hours of therapeutic mentoring by a trained mentor and life coach and must be

supervised by a licensed clinical social worker. All 180 hours of compensatory education must be completed by the end of the 2012-2013 school year.

Dated this 27th day of August, 2012.

/S Joseph P. Selbka

Joseph Selbka, Esq.

Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).