DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: September 18, 2012

Hearing Officer: Jim Mortenson

STUDENT HEARING OFFICE
2012 SEP 18 AM 9:13
DCPS

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on July 16, 2012. A resolution meeting was convened on August 10, 2012, and resulted in no agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on August 16, 2012. An untimely response to the complaint was filed on August 14, 2012. The case was initially assigned to Independent Hearing Officer (IHO) Ternon Lee and was subsequently reassigned to the undersigned on August 14, 2012. A prehearing conference was convened by the undersigned on August 15, 2012, and a prehearing order was issued on that date.

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

The parties exchanged disclosures on August 30, 2012, and filed trial briefs on that date. The hearing was convened at 9:00 a.m. on September 7, 2012, at 810 First Street NE, Washington, D.C. The hearing was closed to the public.

The hearing concluded at 2:20 p.m. The due date for this HOD is September 29, 2012. This HOD is issued on September 18, 2012.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

(1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to convene an individualized education program (IEP) team meeting on February 1, 2012, that included a qualified representative of the local education agency (LEA)?

(2) Whether the Respondent denied the Student a FAPE when it failed to convene an IEP team meeting following the March 7, 2012 completion of a functional behavioral assessment (FBA)?

(3) Whether the Respondent denied the Student a FAPE when it failed to provide an IEP reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP revised February 1, 2012, does not include speech and language services, appropriate functional goals to address the Student's behavioral needs, and fails to place the Student in a more restrictive educational setting appropriate to meet his needs?

(4) Whether the Respondent denied the Student a FAPE when it failed to provide special education and related services in conformity with his IEP during the 2011-

2012 school year by not providing all of the speech and language services and behavior support services required by the IEP.

(5) Whether the Respondent failed to provide or respond to the Petitioner's request for an independent educational evaluation (IEE) of the Student's speech and language needs made on June 25, 2012, due to her disagreement with a December 20, 2011 speech and language assessment, as required under 34 C.F.R. § 300.502(b)?

(6) Whether the Respondent unilaterally changed the Student's placement to a less restrictive setting when it placed the Student at School for the 2012-2013 school year?

The substantive requested relief at the time of hearing was:

(1) Compensatory education to address the Student's failing grades and behavioral problems that have resulted in multiple suspensions from school during the 2011-2012 school year, including 10 hours of counseling for 10 weeks, and one hour per week of speech and language services for 14 weeks.

(2) Revisions to the Student's IEP including full time specialized instruction outside of the general education setting and speech and language services.

(3) An independently provided speech and language assessment.

(4) Placement at and transportation to

(5) An IEP team meeting to review the Student's FBA and create a behavior intervention plan (BIP).

The Respondent denied the Student a FAPE when it failed to convene an IEP team meeting on February 1, 2012, that included a qualified representative of the LEA because the resulting IEP was not reasonably calculated to enable the Student to progress toward his annual goals which must be designed to enable the Student to be involved in and progress in the general education curriculum. The Respondent denied the Student a FAPE when it failed to convene a requested IEP team meeting in March, 2012, to develop a BIP because a BIP was developed March 7, 2012, without the involvement of the Petitioner and the Student continued to have behavior difficulties that negatively impacted his progress toward his IEP goals. The Respondent

did not deny the Student a FAPE when the IEP proposed February 1, 2012, failed to include speech and language services because speech and language services were not necessary. The Respondent did not deny the Student a FAPE as a result of inappropriate functional goals in the IEP proposed February 1, 2012, because the IEP included appropriate functional goals to address his behavior. The Respondent denied the Student a FAPE when the IEP proposed February 1, 2012, lacked the level of specialized instruction and behavioral support services to enable him to reach his academic and functional goals. The Respondent denied the Student a FAPE when it failed to provide the Student with behavioral support services in conformity with his IEP during the 2011-2012 school year. The Respondent failed to respond to the Petitioner's request for an IEE due to her disagreement with the Respondent's December 21, 2011 speech and language assessment. The Respondent did not unilaterally change the Student's placement to a less restrictive setting when it assigned him to School for the 2012-2013 school year.

IV. EVIDENCE

Four witnesses testified at the hearing, all for the Petitioner. The Petitioner's witnesses were:

1) The Petitioner, (P)
2) The Student, (S)
3) Assistant Education Director,
4) Yasmeen Howell, Advocate, (Y.H.)

All of the witnesses testified credibly.

24 exhibits were admitted into evidence of 25 disclosures from the Petitioner. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 2	February 1, 2012	IEP
P 3	March 8, 2011	IEP
P 4	September 6, 2011	Service Tracker
	October 3, 2011	Service Tracker
	November 7, 2011	Service Tracker
	December 5, 2011	Service Tracker
	January 8, 2012	Service Tracker
	February 1, 2012	Service Tracker
P 5	June 21, 2011	Service Tracker
	November 22, 2011	Service Tracker
	November 2, 2011	Service Tracker
	December 5, 2011	Service Tracker
	February 6, 2012	Service Tracker
	March 5, 2012	Service Tracker
P 6	March 7, 2012	[Behavior Intervention Plan]
P 7	December 20, 2011	Comprehensive Speech & Language Evaluation
P 8	December 12, 2011	Educational Evaluation
P 9	December 8, 2011	Confidential Comprehensive Re-Evaluation Psychological Assessment
P 10	February 24, 2012	Report to Parents on Student Progress
	January 20, 2012	Report to Parents on Student Progress
	June 20, 2011	Report to Parents on Student Progress
	June 18, 2010	Report to Parents on Student Progress
P 11	June 25, 2012	Letter from Henderson to Barnes-Johnson
P 12	March 29, 2012	Letter from Howell to Special Education Coordinator
P 13	March 13, 2012	Letter from Howell to Special Education Coordinator
P 14	March 2, 2012	Letter from Howell to Special Education Coordinator
P 15	Undated	Student Incident History
P 16	September 9, 2011	Email from Kabia to Elam
P 17	September 7, 2011	[Statement of Parker]
P 18	September 6, 2011	[Statement of Gross]
P 19	August 22, 2011 to October 5, 2011	Student Incident Report
P 20	August 23, 2011	Incident Report
P 21	February 1, 2012	Disability Worksheet: Multiple Disabilities
P 22	Undated	Classroom Observation Tool
P 23	November 3, 2011	IEP Progress Report – Annual Goals
P 24	April 6, 2012	Attendance Summary
P 25	August 27, 2012	Letter from Corley to [Petitioner]

Ten exhibits were admitted into evidence of the Respondent's ten disclosures. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	February 2, 2012	[Manifestation Review Form]
R 2	February 1, 2012	Final Eligibility Determination Report
R 3	February 1, 2012	Evaluation Summary Report; Prior Written Notice – Identification
R 4	April 11, 2012	Prior Written Notice – IEP Amendment
R 5	April 11, 2012	Standard IEP Amendment Form (LEA Initiated)
	March 7, 2012	[Behavior Intervention Plan]
R 6	April 11, 2012	Amended Individualized Education Program (IEP)
R 7	May 8, 2012	[Incident Report]
R 8	June 14, 2012	IEP Progress Report – Annual Goals
R 9	February 1, 2012	Service Tracker
	February 6, 2012	Service Tracker [Speech-Language]
	February 6, 2012	Service Tracker [Behavioral Support Services]
	March 5, 2012	Service Tracker
	May 4, 2012	Service Tracker
R 10	February 10, 2012	IEP

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

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

1. Student is a year old learner with disabilities.[2] During the 2011-2012 school year, the Student was enrolled in the eighth grade at School.[3] The Student was assigned to ninth grade at School for the 2012-2013 school year.[4] The

[2] R 2, R 3, P 2/R 10, P 3, P 9.
[3] Testimony (T) of S, T of P.
[4] T of S, T of P.

Petitioner was not involved in the decision to assign the Student to and she did not agree with the decision.[5]

2. The Student has been determined eligible for special education and related services under the category multiple disabilities.[6] The Student's disabilities include specific learning disabilities and emotional disturbance (and attention deficit hyper activity disorder).[7] The Student has extremely low cognitive functioning skills and very low academic performance.[8] He demonstrates weakness in study skills, is poorly organized, and does not turn in assignments or attend class regularly or consistently.[9] He also has low adaptive functioning which affects his behavior.[10] He has a high number of aggressive behaviors, is often argumentative, defiant, and threatening to others.[11] He tends to have extreme difficulty adapting to changing situations and recovering from such situations.[12] The significance of his impairment has resulted in a "holding pattern in that his skills have remained dormant and [he] has not made any progress in the area of educational learning."[13] He has been suspended about 20 times over the course of the school year.[14]
3. The IEP in place at the start of the 2011-2012 school year included one hour per month of speech and language services and 30 minutes per week of behavioral support services.[15]
4. At the end of the 2011-2012 school year the Student had made no progress on any of his annual IEP goals.[16] He had not made any progress on the annual goals in the prior IEP as of

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[5] T of P.
[6] R 2, R 3, P 2/R 10.
[7] P 2/R 10, P 3, P 9.
[8] P 9, R 8.
[9] P 9, R 8, P 23, P 24.
[10] P 9, P 2/R 10.
[11] P 9.
[12] P 9.
[13] P 9.
[14] T of P.
[15] P 3.

November 2011, either.[17] At the end of the second term for the 2011-2012 school year, the Student had failed four five graded classes (and earned a "D" in the fifth).[18]

5. An assessment of the Student's speech and language needs was conducted in December 2011 by the Respondent.[19] The data generated from the assessment indicates the Student "has weaknesses in some aspects of his language ability," and combined with other assessment and performance data shows that any weaknesses are not the result of a disability.[20]

6. The Respondent conducted a comprehensive psychological assessment of the Student in December 2011.[21] The recommendations from the school psychologist who conducted the assessment included:[22]

   - A smaller structured environment with a behavior modification approach to meet his educational, emotional, ADHD, and behavioral needs (the report notes specifically that School cannot meet his needs given his limited functioning);
   - A classroom in which clear, simple instructions and directions for academic tasks can be given (due to his limited academic skills in reading, math, and writing);
   - The use of shorter tasks that will be increased as the Student succeeds;
   - The use of a modified program with materials and ample time to complete assignments;
   - Teacher to maintain expectations within the ability of the Student and interact frequently with the Student to maintain his involvement with the assignment, because the Student has a very short attention span resulting in difficulty staying on task;

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[16] R 8.
[17] P 23.
[18] P 10. (It is unclear why neither party introduced evidence of the Student's final grades for the 2011-2012 school year. He was promoted to the ninth grade following the end of the school year. However, the Student only passed four of eight classes the prior school year, yet was promoted to the next grade level despite not having learned much of the material. (English, Math, Science, and History all had failing grades at the end of seventh grade.) It is unclear why the Student was promoted or how he could have been expected to do anything more than fail the eighth grade given the lack of education he received the prior year. Nevertheless, the Petitioner has shown a pattern of failure that has been supported by the Respondent's exhibit – the IEP progress reports at R 8.)
[19] P 7.
[20] P 7.
[21] P 9.
[22] P 9.

- Variety of assessments of the Student's performance, including: verbal, simulation, drills, and manipulatives;
- Identification and frequent use of the Student's most efficient mode of learning, and development of basic study skills in academics;
- Provide positive feedback and prevent frustrating and anxiety provoking assignments. Give encouragement constantly, especially when small attempts to comply have been made;
- Provision of supportive information to assist him in responding appropriately to the environment around him;
- Teaching the Student to recognize environmental cues and making sure such cues are used constantly in all locations;
- Teaching the Student decision making strategies;
- Providing the Student as much supervision as possible because he does not use his time constructively; and
- Providing a wrap-around counseling environment to help him achieve stability.

7. There was a meeting to review and revise the Student's IEP on February 1, 2012.[23] There was no qualified representative of the Respondent (the local education agency, or LEA) at the meeting.[24] The IEP was revised without any prior written notice of the proposals or any refusals nor the data upon which the proposals or any refusals were made.[25]
8. The IEP does not include speech and language goals or services.[26] In addition to academic goals (not at issue here) the IEP includes three functional goals dealing with behavior, including: following adult directives; attendance; and coping when upset or angry.[27] The special education services in the IEP include: nine hours per week of specialized instruction

[23] P 2/R 10, R 2.
[24] P 2/R 10, R 2.
[25] P 2/R 10. (Neither party presented evidence of a prior written notice, pursuant to 34 C.F.R. § 300.503, which would, among other things, explain the proposals and/or refusals and the reasons for them. Thus, it is implied the notice does not exist.)
[26] P 2/R 10.
[27] P 2/R 10.

in mathematics outside of the general education setting; nine hours per week of specialized instruction in reading outside of the general education setting; eight and a half hours per week of specialized instruction in writing outside of the general education setting [28] The IEP also included 30 minutes per week of behavioral support services per week outside of the general education setting.[29] None of the recommendations of the school psychologist were included in the IEP.[30]

9. On March 2, 2012, the Petitioner, through her educational advocate, sent a letter to the Respondent requesting another IEP team meeting, this time to review an FBA and develop a BIP for the Student.[31] There was no FBA to review, however.[32] Subsequent letters requesting the meeting were sent on March 13, 2012, and on March 29, 2012.[33] The Respondent never replied to the requests.[34]
10. A BIP was put together on March 7, 2012, without any input from the Petitioner.[35] The BIP addresses some of the Student's behaviors, but not attendance.[36]
11. For the 2011-2012 school year the Student was to receive 360 minutes of speech and language services before they were discontinued on February 1, 2012.[37] The Student received

[28] P 2/R 10.
[29] P 2/R 10.
[30] P 2/R 10, P 9.
[31] P 14.
[32] Neither party presented evidence of an FBA, and so it is presumed not to exist. The Petitioner introduced P 6 as an FBA at hearing, but P 6, which is included in the record, is a BIP. (Y.H. also testified that P 6 is a BIP, which clearly it is).
[33] P 13, P 12.
[34] T of Y.H.
[35] R 5/P 6.
[36] R 5/P 6.
[37] P 3. (Administrative notice is taken of the Respondent's school calendar for the 2011-2012 school year.)

270 minutes of speech and language services.[38] At least one hour of service was missed near the beginning of the year as a result of a suspension.[39]

12. For the 2011-2012 school year the Student was to receive 20.5 hours of behavioral support services.[40] The Student received 8.75 hours of behavioral support services for the school year.[41]

13. On June 25, 2012, through her attorney, the Petitioner advised the Respondent she disagreed with the speech and language assessment that was conducted in December 2011, and requested an independent speech and language assessment.[42] The Respondent never responded to the request.[43]

14. The Petitioner selected Academy, a non-public special education day school in Virginia, as a placement for the Student.[44] Academy accepted the Student for the 2012-2013 school year following a record review, interview, and day-long review of the school by the Student.[45] The School includes a therapeutic program for students with behavioral needs and has a student/adult ratio of three to one in its classrooms with never more than nine students in a class.[46] There are related service staff at the school to work with students, including behavioral counselors, clinical psychologist, art therapists, and others.[47] The school uses a school-wide behavioral plan with positive behavior interventions that is

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[38] P 4, R 9.
[39] P 4. (The Student was suspended multiple times over the course of the school year (T of P). The suspension near the beginning of the year is presumed to not have exceeded 10 days after which services would have been required to be provided despite the suspension, pursuant to 34 C.F.R. § 300.530.)
[40] P 2/R 10, P 3.
[41] P 5, R 9. (The parties did not introduce service tracking logs for every week of the school year. Where service tracker logs are missing, it is presumed such records do not exist and so services were not provided.)
[42] P 11.
[43] No evidence of a response was entered into the record, thus it is presumed no response was made.
[44] T of A.W., P 25.
[45] T of A.W., P 25.
[46] T of A.W.
[47] T of A.W.

modified based on the individual needs of students.[48] Students with various disabilities, including specific learning disabilities, other health impairments, multiple disabilities, emotional disturbances, intellectual disabilities, and traumatic brain injury, attend the School.[49] Student ages range from seven to 21 years old, and may be as young as five.[50] A multi-sensory approach to learning is used at the School, including language based, visual, and hands-on. The State Education Agency (SEA) for the District of Columbia (OSSE) has provided a certificate of approval for District of Columbia local education agencies (LEAs) to send students to Accotink.[51] OSSE has also approved the price charged, which is per day (or approximately per year) plus per hour for individual counseling services, which is comparable with similar non-public schools.[52] The Student will be able to work toward graduation with a District of Columbia diploma at the School.[53]

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the

[48] T of A.W.
[49] T of A.W.
[50] T of A.W.
[51] T of A.W.
[52] T of A.W.
[53] T of A.W.

evidence. *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

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

34 C.F.R. § 300.17. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). When an alleged denial of FAPE is based on a procedural violation, the procedural inadequacy will be found to have resulted in a denial of FAPE only if it: "(i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit." 34 C.F.R. § 300.513(a). *See also,* Lesesne v. District of Columbia, 477 F.3d 828, 834 (D.C.Cir. 2006) (Failure to comply with procedural requirement constitutes a denial of FAPE only if the violation actually "affected the student's substantive rights.") "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see* Reid v. District of Columbia, 401 F.3d at 519-20; the nature and effects of the child's disability have not been adequately monitored, *see* Harris v. District of Columbia, 561 F. Supp. 2d at 68; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See* Gellert v. District of Columbia

Public Schools, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006)." Suggs v. District of Columbia, 679 F. Supp. 2d 43, 53 IDELR 321 ((D.D.C.2010). An IEP is developed or revised based on data from, typically, various sources such as assessments, class work, teacher and staff observations, and parent information, among other things. 34 C.F.R. §§ 300.324, 300.503. The data upon which proposals and refusals are based must be documented in a written notice to the parents. 34 C.F.R. § 300.503.

3. The Petitioner has shown the Respondent failed to have an LEA representative at the February 1, 2012, IEP team meeting, as required by 34 C.F.R. § 300.321(a)(4). The LEA representative is someone who "(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meeting the unique needs of children with disabilities; (ii) Is knowledgeable about the general education curriculum; and (iii) Is knowledgeable about the availability of resources of the public agency." 34 C.F.R. § 300.321(a)(4). The evidence in the record shows the Student failed to make any progress toward the annual goals in the IEP following the revision of the IEP in February 2012. The Respondent argues that the Student's lack of progress is a result of his attendance problems. However, this behavior is precisely one of the behaviors that the IEP attempted to address. It was ineffective. Thus, this violation, coupled with other procedural and substantive violations described below, contributed to the denial of a FAPE to the Student.

4. An IEP team must consider, for a student "whose behavior impedes the child's learning or that of others, . . . the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2)(i), *See also* D.C. Mun. Regs. 5-E3007.3. "An individual behavior plan shall be developed and incorporated into the IEP." D.C. Mun. Regs. 5-E3007.3.

5. The Petitioner, through her advocate, requested in writing, three times during March 2012, to have an IEP team meeting to review an FBA and develop a BIP. There is no FBA in the record, however, and so it is presumed to not exist. Yet, both parties presented a BIP that is dated March 7, 2012. However, even though the BIP is not based on an FBA, which is not essential, there was no IEP team meeting to develop the BIP. Perhaps most importantly, the BIP did not address one of the Student's key behavior problems – attendance. These multiple failures have led to a denial of FAPE because the Student continued to have significant behavioral problems, particularly attendance, which continued to result in a lack of progress toward his annual goals.

6. Federal regulations at 34 C.F.R. § 300.320 lists the required contents of an IEP:

> (a)(1) A statement of the child's present levels of academic achievement and functional performance, including—
> (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
> (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
> (2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
> (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
> (B) Meet each of the child's other educational needs that result from the child's disability;
> (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
> (3) A description of— (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
> (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
> (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —
> (i) To advance appropriately toward attaining the annual goals;
> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
> (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
> (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
> (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular

regular State or districtwide assessment of student achievement, a statement of why—
(A) The child cannot participate in the regular assessment; and
(B) The particular alternate assessment selected is appropriate for the child; and
(7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

7. Assessment data does not show the Student has speech and language needs, and so the IEP revised February 1, 2012, is not inappropriate because it lacks goals and services concerning speech and language. The Student does have significant functional needs, particularly in the area of behavior. Several behavioral goals are in the IEP, including a goal address the Student's attendance. The IEP is not inappropriate because of a lack of functional goals to address his behavior. The IEP does lack the special education and related services to address the academic and functional goals in the IEP and is, thus, inappropriate. None of the recommended supports and services for the Student were incorporated into the IEP, and there is no explanation why the IEP included the services it did and why recommended services were left out. (The school psychologist was at the meeting.) The result was continued attendance problems and a lack of progress toward all of the annual goals, demonstrating a denial of FAPE.

8. The IDEA "is violated when a school district deviates *materially* from a student's IEP." Wilson v. D.C., 770 F.Supp. 2d 270, 275 (D.D.C. 2011), *citing:* Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."); *accord* S.S. ex rel. Shank v. Howard Road Acad., 585 F. Supp. 2d 56, 68 (D.D.C. 2008); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom.* E.C. v. District of Columbia, No. 07-7070 (D.C. Cir.

Sept. 11, 2007). "[T]he materiality standard *does not require that the child suffer demonstrable educational harm* in order to prevail" on a failure-to-implement claim. Wilson, at 275 (emphasis in original), *citing*: Van Duyn, 502 F.3d at 822 (emphasis added); cf. MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). "Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." Id., *See, e.g.*, Van Duyn, 502 F.3d at 822; S.S., 585 F. Supp. 2d at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

9. The Student only missed 70 minutes of 360 minutes of speech and language services he was entitled to during the 2011-2012 school year. At least 60 of those minutes can be attributed to being suspended near the beginning of the school year. Thus, this was not a material failure to implement the IEP. On the other hand, the Student was provided only 8.75 hours of the 20.5 hours of behavioral support services he was entitled for the 2011-2012 school year. Since the Student was denied more than half of the services he was to receive, this is a material failure and is a denial of FAPE.

10. A parent is entitled to a publicly funded independent educational evaluation (IEE) "if the parent disagrees with an evaluation obtained by the public agency, . . ." 34 C.F.R. § 300.502(b). When a request for an IEE is made by a parent, the public agency must either "[e]nsure that an [IEE] is provided at public expense," or request a due process hearing to demonstrate its evaluation was appropriate. Id.

11. The Petitioner, through Counsel, requested an IEE on June 25, 2012, because she disagreed with the Respondent's speech and language assessment completed in December 2011. There is no evidence the Respondent ever responded to the request or initiated a due process hearing to show its evaluation was appropriate.

12. The Respondent must ensure parents "are members of any group that makes decisions on the educational placement of their child." 34 C.F.R. § 300.327. The Office of Special Education Programs (OSEP) analyzed the question of "whether a public school board has the unilateral discretion under the [IDEA] to choose the educational placement of a child with a disability as an administrative matter to the exclusion of any input from that child's parents." Letter to Veazey, 37 IDELR 10 (OSEP Nov. 26, 2001). The answer is no, but the matter is complicated because of the vagaries of what is meant by "placement." Whether moving a child from one building to another is a change of placement depends on whether the program in the new building "is substantially and materially similar to the former placement" and, if it is, such a change is not a change in placement. 71 Fed. Reg. 46588-89 (August 14, 2006). According to OSEP:

> Historically, we have referred to ''placement'' as points along the continuum of placement options available for a child with a disability, and ''location'' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

Id. at 46588.

13. The Student ended his middle school years at School at the end of the 2011-2012 school year. He was then assigned to School, another regular school where he may have attended if not disabled. His IEP was not changed over the course

of the summer and there was no change in where on the "continuum of placement options" the Student was placed. The Petitioner simply disagreed with sending the Student to Anacostia. Since this was not a change in educational placement, there is no violation.

14. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). The Petitioner seeks compensatory education as a remedy in this case. Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel, Reid v. District of Columbia, 401 F.3rd 516, 523, 43 IDELR 32, (p 5, p 6) (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., *citing* Reid, 401 F.3d at 524; *see* Stanton ex rel. K.T. v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010).

15. The Petitioner is also seeking a prospective nonpublic placement. When considering prospective nonpublic placement as a remedy, the following factors must be considered: a) the nature and severity of the Student's disability; b) the Student's specialized educational needs; c) the link between those needs and the services offered by the private school; d) the

reasonableness of the placement's cost; and e) the extent to which the placement represents the least restrictive environment. Branham v. District of Columbia, 427 F. 3d 7, 12, 44 IDELR 149, ___ (pdf pg. 5) (D.C. Cir. 2005). "Because placement decisions implicate equitable considerations, moreover, courts may also consider the parties' conduct." Id., *citing* Reid v. District of Columbia, 401 F.3d 516, 524, 43 IDELR 32, ___ (D.C. Cir. 2005).

16. Compensatory education is not warranted or available in this case. First, the Petitioner seeks compensatory speech and language services. However, none of the violations found here are related to speech and language services. Second, the Petitioner seeks compensatory behavioral support services in the form of counseling. The Petitioner has not shown where the Student would have been but for the lack of behavioral support services, so compensatory services are not the appropriate remedy here. However, the Petitioner is seeking to address the Student's needs in a comprehensive way consisting of IEP revisions and placement in a nonpublic school. For the reasons described below, this will remedy any harm to the Student as a result of the failure to provide behavioral support services during the 2011-2012 school year.

17. The Petitioner seeks revisions to the IEP to include "full-time" special education services outside of the general education setting. This is appropriate for the Student at this time. The details of the IEP will be better addressed by the IEP team following the Student's placement at Academy, which has accepted him. Furthermore, the Student's functional behavior must be assessed once he is placed at and the IEP team can then also consider the results of the FBA and develop an appropriate BIP that will be part of his revised IEP.

18. The Student has significant learning problems, is very far behind his peers in the curriculum, and has been experiencing significant behavioral problems. His needs include specialized instruction, remediation in curriculum content, and consistent behavioral support services.

Academy, which has accepted the Student, is a school designed to address the needs of students similar to the Student. The cost of . is set by the SEA, and there is no comparative data to suggest it is not otherwise reasonable. Finally, the school is the least restrictive environment (LRE) for the Student because of his needs and demonstrated lack of progress toward his IEP goals. Thus, is an appropriate placement for the Student.

VII. DECISION

1. The Respondent denied the Student a FAPE when it failed to convene an IEP team meeting on February 1, 2012, that included a qualified representative of the LEA because the resulting IEP was not reasonably calculated to enable the Student to progress toward his annual goals.
2. The Respondent denied the Student a FAPE when it failed to convene a requested IEP team meeting in March, 2012, to develop a BIP because a BIP was developed March 7, 2012, without the involvement of the Petitioner did not address the Student's attendance issues, which negatively impacted his progress toward his goals.
3. The Respondent did not deny the Student a FAPE when the IEP proposed February 1, 2012, failed to include speech and language services because speech and language services were not necessary. The Respondent did not deny the Student a FAPE as a result of inappropriate functional goals in the IEP proposed February 1, 2012, because the IEP included appropriate functional goals to address his behavior. The Respondent denied the Student a FAPE when the IEP proposed February 1, 2012, lacked the level of specialized instruction and behavioral support services to enable him to reach his academic and functional goals.
4. The Respondent denied the Student a FAPE when it failed to provide the Student with behavioral support services in conformity with his IEP during the 2011-2012 school year.
5. The Respondent failed to respond to the Petitioner's request for an IEE.

6. The Respondent did not unilaterally change the Student's placement to a less restrictive setting when it assigned him to School for the 2012-2013 school year.

VIII. ORDER

1. The Student will be placed at Academy for the 2012-2013 school year at the Respondent's expense, including transportation to and from school.
2. An FBA must be conducted of the Student within 15 school days of the start of his attendance at Academy.
3. The Student's IEP will be revised with the IEP team at Academy. The IEP team meeting must occur no later than 20 school days following the Student's start of attendance at Accotink. The IEP must be revised to address the services recommended in P 9, the findings of this HOD, the results of the FBA, including a BIP if necessary, and any other matters determined necessary by the IEP team. All recommendations must be considered and all recommendations and refusals documented in a notice in accordance with 34 C.F.R. § 300.503.
4. The Respondent must ensure, within 30 days of the date of this order, that the Petitioner may obtain, at public expense, an IEE consisting of a speech and language assessment that meets agency criteria. The Respondent must ensure the results of the assessment are reviewed and discussed by the Student's IEP team. The Petitioner has the obligation to obtain the IEE within 90 days of the date she receives written assurance from the Respondent that she may obtain such an IEE at public expense. The Respondent will ensure the IEP team meets to review the IEE and revise the IEP, if necessary, based on the results of the IEE. This meeting must occur within 20 school days of the Respondent's receipt of the IEE report.

IT IS SO ORDERED.

Date: September 18, 2012

Jim Mortenson, Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).