

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 29, 2012

Hearing Officer: Jim Mortenson

Case Nos: 2012-0491 & 2012-0543²

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint for Case #2012-0491 was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on July 16, 2012. A resolution meeting was convened on July 26, 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 7, 2012. A prehearing conference was convened by the undersigned on August 7, 2012, and a prehearing order was issued on August 8, 2012.

Prior to this complaint the Petitioner had filed two complaints during the 2011-2012 school year. The first case, #2011-1196, was withdrawn and dismissed without prejudice on January 31,

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

² These cases were heard concurrently because they involved the same parties and were filed in close proximity with each other, but were not otherwise consolidated.

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2012. The second case, #2012-0276, was dismissed with prejudice on May 31, 2012, due to “the late request for withdrawal, the lack of explanation for the withdrawal, the lack of a resolution meeting or any waiver of the resolution meeting, and the Respondent’s preparation for hearing[.]” One of the issues in the pending complaint was identical to one of the issues in case #2012-0276 and the Respondent moved to dismiss the case on this basis on August 8, 2012. The motion was denied in a written order on August 14, 2012, because the Petitioner was not aware that her former attorney had withdrawn the prior case nor that it was dismissed with prejudice.

The Petitioner filed another complaint, case #2012-0543, on August 9, 2012. This complaint had a different issue and the same requested relief. The Petitioner moved to consolidate the cases and the motion was denied in writing on August 29, 2012, following the prehearing for the second complaint held on that date. However, the cases were heard concurrently even though they remained separate administratively. This HOD covers the findings of fact, conclusions of law, and determinations for both complaints and will be incorporated into the record for both cases.

The parties exchanged disclosures on September 13, 2012. The Petitioner filed a trial brief, as required by order of the undersigned, and the Respondent did not. The hearing was convened at 8:45 a.m. on September 20, 2012, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Petitioner was represented by Roberta Gambale, Esq., and the Respondent was represented by William Jaffe, Esq. The hearing concluded at 5:35 p.m. The due date for this HOD is September 29, 2012. This HOD is issued on September 29, 2012.

During the course of the hearing evidence arose indicating the Student may not be a resident of the District of Columbia. This was discussed privately with Counsel during a break in the hearing. Additional testimony clouded the question of whether the Student was a resident. After the presentation of cases the Respondent made a motion to dismiss because the evidence showed

the Student slept at his Grandmother's home outside of the District of Columbia. The motion was denied because: the undersigned determined that it was not clear where the Student resided because he spent time with both his Mother in the District of Columbia, and Grandmother outside of the District of Columbia, since October 2011; that this arrangement was made based on a recommendation by school staff; the question of residency was never previously raised by the Respondent; and because there is a separate administrative process, pursuant to DC ST § 38, to permit the Respondent to contest residency.

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 for Case #2012-0491 are:

- (1) Whether the Respondent was required to and failed to conduct a psychiatric assessment of the Student requested by the Petitioner on May 18, 2011?
- (2) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose or provide an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP does not include placement in a residential program?

The issue to be determined by the IHO for Case #2012-0543 is:

- (1) Whether the Respondent denied the Student a free appropriate public education (FAPE) as a result of failing to timely convene an individualized education program (IEP) team meeting to review an independent psychological assessment report completed March 19, 2012, and revise the Student's IEP as appropriate?

The substantive requested relief at the time of hearing was:

- (1) Placement in the Devereux Georgia residential treatment facility, including transportation.
- (2) Compensatory education upon exiting the residential facility consisting of independent tutoring for five hours per week for nine to ten months, and counseling for one hour per week for nine to ten months.

Regarding Case #2012-0491, there was no evidence the Petitioner ever requested a psychiatric assessment on May 18, 2011, or ever. The Respondent denied the Student a FAPE when, despite some attempts to meet the Student's needs at the special education day school, the Student continued to not make progress and the Respondent never proposed an IEP reasonably calculated to enable the Student to be involved in or make progress in the general education curriculum and never provided written notice explaining its refusal to place the Student in a more restrictive residential setting.

Regarding Case # 2012-0543, although the Respondent took over five months to convene an IEP team meeting to review an assessment report provided by the Petitioner on March 30, 2012, there is no evidence this failure impeded the Student's right to FAPE, significantly impeded the Petitioner's opportunity to participate in the decision making process regarding the provision of FAPE to the Student; or caused a deprivation of educational benefit. The Petitioner was always represented by counsel, and so she is deemed to have known she could challenge the refusal to convene the meeting at any time, which she did in filing the complaint on August 9, 2012. The meeting ultimately held did not result in any significant changes to the program already in place which had already denied the Student a FAPE.

IV. EVIDENCE

Six witnesses testified at the hearing, five for the Petitioner and one for the Respondent. The Petitioner's witnesses were:

- 1) The Petitioner, (P)
- 2) The Petitioner's Mother, (E.T.)
- 3) [REDACTED], Psychologist (provided expert opinion based on expertise in school and clinical psychology and assessment of the Student), (D.H.)
- 4) [REDACTED], Vice-Principal of Children's Guild, Chillum Campus, (B.D.)
- 5) [REDACTED], Admissions Specialist, Devereux Georgia Treatment Network, (B.T.)

The Respondent's witness was [REDACTED], DCPS Progress Monitor, (L.C.)

Some of the Petitioner's testimony was credible, while some was not due to evasiveness and her ability to remember some details fairly precisely and other significant details could not be remembered very precisely. Additionally, some testimony that should have been in her personal knowledge was contradicted by documentary evidence or other testimony. E.T.'s testimony was also suspect because of evasiveness and statements that contradicted the specific statements of the Petitioner. D.H. provided a credible expert opinion that was not contradicted by any other expert opinions. B.D. provided credible testimony with candid answers. B.T. provided credible testimony based on her knowledge of the facility she works for. L.C. provided some credible testimony, but much of her testimony lacked necessary support in corroborating evidence³ and her lay opinions about the kind of placement sought by the Petitioner were not backed by meaningful knowledge or experience on the witness's part.

³ Such as assertions about abuse of the Student.

57 exhibits were admitted into evidence of 57 disclosures from the Petitioner.⁴ The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	March 19, 2012	Comprehensive Psychological Evaluation
P 2	March 27, 2012	Discharge Summary Note
P 3	September 14, 2011	Facsimile Transmittal Sheet (Cover for two prescription notes) ⁵
P 4	May 28, 2010	Confidential Comprehensive Psychological Evaluation
P 5	November 19, 2010	[Behavior Intervention Plan]
P 6	Undated	[Functional Behavioral Assessment]
P 7	April 25, 2011	Documents Review Report
P 8	October 4, 2011	[Student] MDT Meeting – Advocate Notes
P 9	October 4, 2011	[Behavior Intervention Plan]
P 10	October 28, 2011	Meeting Notes
P 11	October 28, 2011	Prior Written Notice
P 12	October 28, 2011	Justification and Plan for Dedicated Aide
P 13	October 28, 2011	IEP
P 14	January 26, 2012	Present Levels of Academic Achievement
P 15	January 26, 2012	IEP Meeting Notes
P 16	January 26, 2012	Prior Written Notice
P 17	July 31, 2012	Letter of Invitation to a Meeting (See R 2)
P 18	September 6, 2012	[Student]: IEP Meeting
P 19	October 12, 2010	IEP
P 20	May 26, 2011	Occupational Therapy Re-Evaluation Report
P 21	May 26, 2012	Comprehensive Speech and Language Evaluation
P 22	December 12, 2007	Psychiatric Evaluation
P 23	September 14, 2007	Psychiatric Evaluation
P 24	September 16, 2011	[Behavior Incident Form]
P 25	September 20, 2011	[Behavior Incident Form]
P 26	September 20, 2011	[Behavior Incident Form]
P 27	September 20, 2011	Student Intervention Report
P 28	September 22, 2011	Letter from Daniels to Petitioner
P 29	September 22, 2011	[Behavior Incident Form]
P 30	September 22, 2011	[Behavior Incident Form]
P 31	September 22, 2011	Student Intervention Report
P 32	September 28, 2011	Letter from Daniels to Petitioner
P 33	September 28, 2011	Student Intervention Report
P 34	October 28, 2011	Student Intervention Report
P 35	December 9, 2011	[Behavior Incident Form]

⁴ P 50 was mislabeled and not included as a separate exhibit.

⁵ It is noted that one of the notes stated the Student "is a danger to himself and others" and that "[h]e requires residential placement." This evidence carries no weight. Such strong statements, written on a prescription pad less than five by four inches, with no report of the data or other basis for the statements appears, at best, to be questionable medical practice to a lay person unfamiliar with the ethics requirements for medical doctors.

<u>Ex. No.</u>	<u>Date</u>	<u>Document (cont.)</u>
P 36	December 15, 2011	[Behavior Incident Form]
P 37	December 16, 2011	Letter from [REDACTED] to Petitioner
	January 13, 2012	Student Intervention Report
P 38	January 13, 2012	Intervention Report
P 39	January 26, 2012	Student Intervention Report
P 40	February 9, 2012	Student Intervention Report
P 41	February 28, 2012	Student Intervention Report
P 42	March 15, 2012	Student Intervention Report
P 43	March 21, 2012	[Report of Student Conduct/Condition]
P 44	May 11, 2012	Student Intervention Report
P 45	April 11, 2012	Student Intervention Report
P 46	May 23, 2012	Student Intervention Report
P 47	October 12, 2010	IEP Meeting
P 48	May 31, 2011	Speech and Language Present Level of Performance
	June 14, 2011	Present Level of Performance
P 49	October 5, 2010	Present Level of Performance
P 51	September 14, 2011	Letter from [REDACTED] to [REDACTED]
P 52	April 24, 2012	Letter from [REDACTED] to [REDACTED]
P 53	May 14, 2012	Letter from [REDACTED] to [REDACTED]
P 54	July 16, 2012	Letter from Gambale to Special Education Coordinator
P 55	July 17, 2012	Email chain ending from Gambale to [REDACTED]
P 56	September 10, 2012	Email chain ending from [REDACTED] to [REDACTED]
P 57	September 10, 2012	Email from [REDACTED] to [REDACTED]
P 58	Undated	Resume of [REDACTED]

Three exhibits were admitted into evidence of the Respondent's three disclosures. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	August 21, 2012	RSM Notes
R 2	July 31, 2012	Letter of Invitation to a Meeting (See P 17)
R 3	August 14, 2012	Email Chain ending from [REDACTED] to [REDACTED]

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 [REDACTED] learner with a disability.⁶ The Student has been determined eligible for special education and related services under the category of emotional disturbance.⁷ The Student suffers from a moderate intellectual disability, oppositional defiant disorder, major depressive disorder, and attention deficit hyperactivity disorder/combined type.⁸ His disabilities result in very low cognitive abilities and very high levels of oppositional defiance which are limiting his learning of academic and social skills.⁹ He feels very sad and frustrated knowing that his family is aware of his limitations and has relationship problems with his mother.¹⁰ His lack of social skills affects him both at home and at school, and he often runs away from both places, sometimes for days at a time.¹¹ He refuses to follow adult directions, including participating in classwork, related services, or assessments.¹²
2. The Student was placed by the Respondent at the Children's Guild (CG), Chillum Campus, and he has attended that school since 2007.¹³
3. The two most recent psychiatric assessments were completed in September and December of 2007, respectively.¹⁴ The Petitioner made no request for a psychiatric assessment in the last two years.¹⁵

⁶ P 1, P 13.

⁷ P 13.

⁸ P 1, P 2.

⁹ P 1.

¹⁰ P 1, P 7.

¹¹ P 1, Testimony (T) of P, T of E.T.

¹² T of P, T of D.H., T of B.D., T of E.T., P 1, P 8, P 10, P 15.

¹³ T of P, T of B.D.

¹⁴ P 22, P 23.

¹⁵ T of P (P did not recall making a request for a psychiatric assessment), P 8, P 10, P 15, P 18, P 47 (IEP team meeting notes include no mention of a request for a psychiatric assessment), P 11 & P 16 (Prior written notices

4. In November 2010, the Student was provided with a behavior intervention plan (BIP) that was designed to help the Student “identify feelings and state them with appropriate words[,]” and “to manage disappointment, frustration, and anger by using the taught coping skills.”¹⁶
5. On April 18, 2011, the Student was hospitalized in a mental health unit for being a “[d]anger to Self/Others[.]”¹⁷ There is no evidence in the record specifically describing why the Student was a danger, however.¹⁸ The Student was prescribed Concerta and Catapres for his ADHD and discharged on April 27, 2011.¹⁹
6. Sometime in October the Petitioner determined, upon recommendation of the school social worker, to have the Student stay at his Grandmother’s home in Maryland.²⁰ He continued to visit his Mother’s home in the District of Columbia and took the bus from Mother’s home to school after being dropped off by E.T.²¹
7. After the start of the 2011-2012 school year an IEP team meeting was convened on October 4, 2011.²² The team discussed the Student’s academic and functional performance.²³ The 12 year old was performing at a kindergarten to first grade level in reading, mathematics, and writing.²⁴ The Student was only in the classroom 25% of the time because he was running away or otherwise leaving the classroom.²⁵ The Student also was engaged in aggressive

include no mention of request for psychiatric assessment), P 51, P 53, P 54, P 55, P 56, P 57
(Correspondence/emails include no request for psychiatric assessment).

¹⁶ P 5.

¹⁷ P 7.

¹⁸ See, e.g. P 7.

¹⁹ P 7.

²⁰ T of P, T of E.T.

²¹ T of P, T of E.T.

²² P 8.

²³ P 8.

²⁴ P 8.

²⁵ P 8.

physical behavior, fighting with other students.²⁶ The team did not know what triggered the Student's behaviors.²⁷ At that time he was taking Depakote, Respiradol, and Chonidine.²⁸

8. L.C. was the local education agency (LEA) representative at the October 4, 2012, IEP team meeting.²⁹ During the meeting L.C. advised the team that the Student's environment needed to be changed to remediate the Student and that his self-esteem was the primary issue.³⁰ She also advised the team that the meeting, after the Parent had left, needed to be reconvened at another time as she wanted time to decide where the case is.³¹

9. The IEP team reconvened on October 28, 2011.³² L.C. again advised the team that she believed the Student required much more structure and a therapeutic placement.³³ The Respondent presented an unspecified "new location of services; more intense behavior program; more restrictive but not residential; parent/family counseling." The Petitioner requested residential placement for the Student and was advised that the request would be submitted but that such a placement would likely be denied because a "board" would make the determination and they would not approve residential because the Student's behaviors were not as severe as what the board looks for in students when deciding whether they can be admitted.³⁴ The CG staff recommended, in part, the student be placed in a group home.³⁵ It

²⁶ P 8.

²⁷ P 8.

²⁸ P 8.

²⁹ T of L.C., P 8.

³⁰ P 8.

³¹ P 8.

³² P 8, P 10.

³³ P 8, P 10, P 11.

³⁴ P 8, P 10. (This explanation was recorded in two sets of meeting notes, but not the prior written notice. The prior written notice simply stated that residential placement, and two other schools were rejected. *See*, P 11.)

³⁵ P 10.

was determined to provide the Student a new one-on-one aide and to change his classroom, and then to reconvene the IEP team in January to review.³⁶

10. The IEP, revised October 28, 2012, includes the following services:³⁷

- Specialized instruction for 28.5 hours per week outside of the general education setting because the Student requires a highly structured small group learning environment with a low student to teacher ratio as well as multisensory remedial instruction in all academic areas, crisis intervention, a behavioral management component and therapy.
- Behavioral support services for 30 minutes per week outside of the general education setting because the Student required specialized instruction in conflict resolution, a low student to teacher ratio, consistent behavior management protocols, highly structured activities, and social skills training.
- Occupational Therapy for 30 minutes per week outside of the general education setting because the Student required additional work on fine motor skills needed to improve handwriting.
- Speech-Language Pathology for 30 minutes per week outside of the general education setting because the Student required additional work on his receptive and expressive language skills.
- Crisis management of exclusion, seclusion, and restraint when the Student is a danger to himself or others, implemented by trained staff.
- Small class size.
- Instructional level materials.
- Use of a highlighter for classroom instruction.

³⁶ P 8, P 10, P 11, P 12, P 13.

³⁷ P 13.

- Visual and verbal presentation educational materials.
- Repetition of academic instruction.
- A full-time dedicated aide.
- Extended school year services over a portion of the summer.

11. The IEP team met again on January 26, 2012, to review the Student's progress.³⁸ The Student was still missing considerable instructional time due to behavioral problems, including leaving the classroom.³⁹ The following interventions had been attempted to help the Student remain in the classroom:⁴⁰

- Use of a timer – student would set for timer for 10 minutes and then get a five minutes break.
- Use of sensory objects to hold, such as a squeeze ball and play-doh.
- Use of a sensory disk.
- Student identified locations in the classroom where he feels most comfortable.

12. The Student's physical aggression toward peers had decreased, while physical aggression toward, and damage to, property had increased.⁴¹ He still only minimally, if at all, engaged in academic work.⁴² He also continued to refuse to participate in related services such as speech and language therapy, and assessments.⁴³ He also had been continuing to run away from home.⁴⁴

³⁸ P 14, P 15, P 16.

³⁹ P 14, P 15.

⁴⁰ P 14.

⁴¹ P 15.

⁴² P 15.

⁴³ P 15.

⁴⁴ P 15.

13. The Petitioner again requested residential placement for the Student at the January 26, 2012 IEP team meeting.⁴⁵ The Respondent agreed a different educational placement was necessary (although the Respondent believed it was only proposing to change the location of services) which included a more academically focused program for students with lower cognitive functioning and a highly structured positive behavior intervention system.⁴⁶ The Respondent determined it would choose this change of placement on its own, however it never made the change and merely referred the Petitioner to possibly three other non-public schools, which the Petitioner declined to enroll the Student in.⁴⁷ The Student remained placed at CG for the remainder of the year.⁴⁸
14. A comprehensive psychological evaluation of the Student was conducted by D.H. on March 8, 2012.⁴⁹ D.H. found that the Student, due to very low cognitive ability and very high level of oppositional defiance which were impacting his learning of academic and social skills, might benefit from an educational situation where he was separate from his family and neighborhood.⁵⁰ This opinion was similar to the school social worker who recommended the Student stay with his Grandmother rather than with his mother.⁵¹ D.H. opined that the Student may be successful if he were in an environment where he saw other children his age who were having the same cognitive and social difficulties which may result in Student not feeling so much failure or inability in dealing with life tasks.⁵² As a result, D.H. opined that the Student would benefit from a residential education program where his dangerous

⁴⁵ P 16, T of L.C.

⁴⁶ P 16.

⁴⁷ P 16, T of L.C., T of P.

⁴⁸ T of P, T of B.D., P 18.

⁴⁹ P 1

⁵⁰ P 1, T of D.H.

⁵¹ T of P.

⁵² P 1, T of D.H.

behaviors can be continually supervised and immediate intervention provided to prevent harm to the Student or others.⁵³

15. The Student was hospitalized on March 21, 2012, in the mental health unit, following a referral by the school social worker to the Petitioner.⁵⁴ While at school the Student had been pushing staff, throwing objects in class, threatened staff, left school property and walked into traffic.⁵⁵ He was released from the hospital on March 26, 2012.⁵⁶ During the course of his hospital stay, the Student was consistently provided with his medication regimen, he participated and was cooperative and engaged in group therapies, and other than minor redirection there were no behavioral issues.⁵⁷
16. The report from the March evaluation by D.H. was provided to the Respondent, through CG, on March 30, 2012.⁵⁸ Despite repeated requests to convene a meeting to review the report, the Respondent determined to wait until the following school year.⁵⁹ The team met on September 6, 2012, following the filing of the complaint.⁶⁰ There is no prior written notice of the Respondent's refusal to hold the IEP team meeting until September 6, 2012, in the record so it is presumed to not exist. The Petitioner was represented by attorneys at all times from when the evaluation report was provided to the Respondent in March, and so she was not deprived of ability to challenge the unwritten refusal to convene the meeting.⁶¹ Neither the IEP nor the Student's educational placement were changed at the meeting.⁶²

⁵³ P 1, T of D.H.

⁵⁴ P 2.

⁵⁵ P 2.

⁵⁶ P 2.

⁵⁷ P 2.

⁵⁸ P 52.

⁵⁹ P 52, P 53, P 54, R 3.

⁶⁰ P 18. (A letter of invitation was sent on July 31, 2012. R 2.)

⁶¹ R 3, P 52, P 53, P 54, P 55.

⁶² P 18.

17. The Student made no functional or academic progress while at CG during the 2011-2012 school year.⁶³ In addition to failing to participate or attend class, he repeatedly engaged in aggressive and oppositional conduct, including fighting and destruction of property.⁶⁴

18. The Petitioner seeks to have the Student placed at Devereux Georgia Treatment Network (Devereux), in Kennesaw, Georgia, a residential treatment facility that she believes will be appropriate for the Student and that agreed to accept the Student as of January 2012 based on a review of his educational and treatment records.⁶⁵ Devereux would need some updated records, such as immunizations and funding confirmation, before admitting the Student.⁶⁶ Devereux is a secure treatment facility located on a 40 acre campus.⁶⁷ The students placed there are continually monitored.⁶⁸ School is provided on the campus Mondays through Fridays from 9:00 a.m. until 3:30 p.m.⁶⁹ Educational services can be provided to students in their dormitories, if necessary.⁷⁰ Classrooms are small with no more than ten students.⁷¹ One on one tutoring is available for students who require such intervention.⁷² Special education teachers are certified in both special education and content areas.⁷³ Related services are provided on campus as well.⁷⁴ A positive behavioral support system is utilized in the school and dormitories, which uses a point system and provide immediate rewards to students.⁷⁵ Devereux is experienced with working with students with low cognitive ability and high

⁶³ T of L.C., T of B.D.

⁶⁴ P 2, P 8, P 10, P 15, P 24, P 25, P 26, P 27, P 28, P 29, P 30, P 31, P 32, P 33, P 34, P 35, P 36, P 37, P 38, P 39, P 40, P 41, P 42, P 43, P 44, P 45, P 46.

⁶⁵ T of B.T. (A clinical team at Devereux reviewed the records.)

⁶⁶ T of B.T.

⁶⁷ T of B.T.

⁶⁸ T of B.T.

⁶⁹ T of B.T.

⁷⁰ T of B.T.

⁷¹ T of B.T.

⁷² T of B.T.

⁷³ T of B.T.

⁷⁴ T of B.T.

⁷⁵ T of B.T.

oppositional defiance.⁷⁶ The cost of the program is \$350 per day, inclusive, but for medications and some related services such as occupational therapy and speech and language therapy.⁷⁷ Once a student is enrolled in the program, a transition plan is developed to assist in reintegrating students into less restrictive settings.⁷⁸ Students are typically in the program for three to six months, and sometimes up to a year.⁷⁹

19. L.C. does not believe the Student should be placed in a residential facility because he would be exposed to students with violent psychosis.⁸⁰ L.C. has no experience working in a residential facility, however, and she did not discuss the Student with Devereux.⁸¹ L.C. believes the Student requires medication management, a community support worker, that family therapy be provided, and that the Student be involved in some sort of enrichment activity with positive peers models to develop positive behaviors.⁸² None of these services were proposed in an IEP, however.⁸³
20. The Student's behavior, including being oppositional, not attending class, and running away from home, need to be managed effectively so that the Student can access the curriculum.⁸⁴ He has demonstrated the ability to be engaged in a residential setting because when he was hospitalized for a week he was engaged.⁸⁵ The Student made no educational progress with the interventions and placement employed over the 2011-2012 school year.⁸⁶ Devereux, or a similar residential facility, can manage the Student's behaviors and deliver the necessary

⁷⁶ T of B.T.

⁷⁷ T of B.T.

⁷⁸ T of B.T.

⁷⁹ T of B.T.

⁸⁰ T of L.C.

⁸¹ T of L.C., T of B.T. (L.C.'s basis for her opinion is the student's she sees in her schools that have come from a regional treatment center.)

⁸² T of L.C.

⁸³ See e.g., P 11, P13, P 16.

⁸⁴ T of D.H., T of B.D., T of L.C., P 2.

⁸⁵ P 2.

⁸⁶ T of B.D., T of L.C.

instruction in order to enable him to be involved in and progress in the general education curriculum because of the expertise of its staff and the structure of its program.⁸⁷

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 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. The Respondent must conduct a reevaluation of a Student if requested by a parent. 34 C.F.R. § 300.303(a)(2), D.C. Mun. Regs. 5-E3005.7. If the Respondent proposes or refuses to conduct a reevaluation, it must provide written notice in accordance with 34 C.F.R. § 300.503. *See also*, 34 C.F.R. § 300.304(a).
3. The Petitioner never requested a reevaluation of the Student consisting of a psychiatric assessment. Thus, the notice requirements for a reevaluation, or refusal of a reevaluation, were never triggered and there is no violation based on the complained of issue.
4. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

⁸⁷ T of B.T., T of D.H., P 1.

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). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d 516, 519-20 (D.C.Cir. 2005); the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs v. District of Columbia*, 679 F. Supp. 2d 43, 53 IDELR 321 (D.D.C.2010). A denial of FAPE will result from a procedural inadequacy only if the procedural inadequacy: “(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 a FAPE to the parent’s child; or (iii) Caused a deprivation of educational benefit.” 34 C.F.R. § 300.513(a)(2). 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.

5. 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.

6. The Student made de minimis educational progress over the course of the 2011-2012 school year. There was no academic or functional benefit provided to the Student by the end of the school year. The IEP was reviewed and revised multiple times. However, the changes never resulted in the Student being involved in and progressing in the general education curriculum, including progressing on his academic and functional goals. The Respondent did propose changing the Student's educational placement within the continuum of placements. The proposals were for other special education day schools, which the Respondent felt were not really changes of placement but merely changes in location that were within its discretion to move the Student. However, the Respondent never did exercise its discretion, instead simply referring the Petitioner to the alternative schools. The facts show that the Respondent made these proposals because the programs, while still in special education day schools,

were not substantially and materially similar to the school the Student was at. For example, L.C., the LEA representative at the October 4, 2011, IEP team meeting, stated that the Student required “a lot more structure and a more therapeutic placement.” Respondent advised the team at the October 28, 2011 IEP team meeting that the Student required a “more intense behavior program; more restrictive but not residential.” The CG staff recommended a group home. At the January 26, 2012, IEP team meeting the Respondent determined that the Student’s placement at CG was no longer appropriate and that the Student required a “more academically focused [program] with lower cognitively functioning students” with a highly structured “positive behavioral intervention system.” It still refused residential placement requested by the Petitioner, without any explanation. L.C. looked into alternative schools, and finally referred the Petitioner to at least three of them in January 2012. It is unknown why the Respondent, since it believed such a change was necessary for the Student, failed to make the change. Because the Student’s behavior and academic performance deteriorated, there was little real monitoring of his progress (as the record includes only testimony or recorded statements about his academic performance and progress toward IEP goals, and no written data collection about performance or progress), and a residential placement where he is constantly supervised appears likely to resolve or at least ameliorate his educational difficulties, the Student was denied a FAPE.

7. An IEP team meeting must be held to review and revise an IEP to address the results of a reevaluation. 34 C.F.R. § 300.324(b)(1)(ii)(B).
8. There was a significant delay between the completion and sharing of the comprehensive psychological evaluation on March 30, 2012, and the IEP team meeting to review the evaluation and revise the IEP on September 6, 2012. It would have been reasonable to

conduct such a meeting well before the start of the next school year so that revisions to the program, if any, could be made and effectuated. The Petitioner has not shown the delay resulted in a denial of FAPE. The IEP and placement were already denying the Student a FAPE, as found herein. Furthermore, when the IEP team meeting did occur, the Respondent failed to make the necessary changes to the IEP and placement to address the Student's lack of educational benefit. Had the meeting occurred any earlier, it is likely the same result would have occurred. Furthermore, the Petitioner's attorneys and their employees were constantly involved and advocating for the Petitioner. Thus, her opportunity to participate in the decision making process was not significantly impeded and, in fact, was perfected once the complaints in these cases were filed, because the meeting was held. In sum, the Student's denial of FAPE was based on other factors not related to the delay of the meeting.

9. 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).

10. 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).
11. While the presumption is that a child with a disability will be educated with his or her non-disabled peers, this presumption is qualified by the severity of a student’s disability and the significance of his or her educational needs. *See* 34 C.F.R. § 300.114(a)(2). “Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.* In this case, the Student had already been placed in a separate school for children with disabilities. During the course of the 2011-2012 school year the Respondent added a one to one aide to assist the Student in that setting, and this failed to result in satisfactory progress. Then the Respondent also discussed and even referred the Petitioner to

different special education schools with what it believed to have different programs that would satisfactorily serve the Student. The Respondent failed to effectuate any alternative placement, however. The Respondent also failed to provide written notice explaining its refusal of the Petitioner's repeated request for a residential setting.

12. But how to determine whether a residential placement is appropriate? A residential facility is an extremely segregated setting, and can be used if necessary for a student with a disability. The Fifth Circuit provides a persuasive analysis to use in examining whether a residential placement is appropriate for a student. "In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education." Richardson Independent School District v. Michael Z., 580 F.3d 286, 299 (5th Cir. 2009). This test is persuasive because it provides a common sense middle ground to tests articulated by the Third Circuit in 1981 (*See, Kruell v. New Castle County Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981) "[a]nalysis must focus ... on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process[,]” and Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813, 817 (7th Cir. 2001) “[t]he essential distinction is between services primarily oriented toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in noneducational activities. The former are ‘related services’ within the meaning of the statute, the latter not.”) As the Fifth Circuit Court explained, “it is not difficult to imagine a case where a disabled child's various difficulties may be impossible for a court to segregate, but the child is still capable of receiving an

educational benefit without private residential placement.” Michael Z., 580 F.3d at 299. Since there is no controlling precedent in the District of Columbia on this point, and because the Michael Z. test is based on sound rationale that is compliant with IDEA standards, it is adopted and used here.

13. A residential placement is essential in order for the Student to receive a meaningful educational benefit. The Student was denied a FAPE as a result of an IEP that was not reasonably calculated to enable the Student to be involved in or progress in the general education curriculum, primarily because it lacked the intensive, therapeutic support services both in and out of the educational setting that was necessary for the Student to access the educational setting. The Student’s behaviors manifested at both home and school and he often ran away from both locations. The only expert opinion in this case, from D.H., indicates the Student requires a residential placement because of his dangerous behaviors, of which he has a long history, and his need for continual supervision with immediate intervention to prevent harm to himself or others. He needs the structure of an organized environment with coordination among the adults to ensure his behaviors are managed so that he can access academic services. The Respondent determined his placement at CG was no longer appropriate in January, yet failed to propose and explain a new placement, merely referring the Petitioner to other day schools with different programs.
14. The only evidence about a residential facility that was provided was about Devereux. The program at Devereux is primarily oriented toward enabling the Student to obtain an education. The Student runs away from both home and school, and Devereux is a locked facility preventing that behavior. School is provided on the campus from 9:00 a.m. until 3:30 p.m. and academic services can be provided, if necessary, in the Student’s dormitory.

Classrooms typically have four or five and no more than 10 students. A positive behavioral support system is in place that includes immediate rewards and a point system to motivate students. This will help enable the Student to be available for learning by addressing his oppositional defiance. Teachers are certified in the areas of special education and academic content, which is important for the Student because of his low cognitive ability and low academic achievement. Related services are provided at the campus. Devereux is familiar with working with students who are both highly oppositional and have low cognitive ability. Thus, the Student will be placed at Devereux, at public expense, unless that facility will no longer take the Student. If Devereux will not take the Student, the Respondent must select a comparable facility and place the Student there.

15. The LEA representative agrees with the Petitioner over some additional services the Student required up to a year ago. These services were not included in the IEP, however, and now that the Student will be in a residential facility for a period of time, will not be necessary until he returns home. The educational harm suffered by the Student as a result of the denial of FAPE is summed up as a general failure to make any academic or functional progress for the 2011-2012 school year. While this will have to be made up while the Student is in the residential facility, the supports recommended by L.C. will be compensatory in nature when he returns home. These compensatory services will include: parent counseling and training; psychological services that include planning and managing a program of psychological services; and psychological counseling for the Student and Parents. These are all available related services, pursuant to 34 C.F.R. § 300.34, that will aid the Student in being involved in and progressing in the general education curriculum upon his return from the residential

facility, and which he should have received as part of his programming for the 2011-2012 school year.

VII. DECISION

Case #2012-0491

1. The Respondent was not required to conduct a psychiatric assessment of the Student.
2. The Respondent denied the Student a FAPE when it failed to revise the Student's IEP appropriately to address his lack of educational progress and failed to advise the Petitioner why her request for a residential setting for the Student was repeatedly denied. A residential setting is appropriate for the Student given his severe academic and functional deficits and the de minimis educational progress he made over the course of the last year, even with the addition of supports and services such as a one to one aide in his special education day school setting.

Case #2012-0543

1. The Respondent did not deny the Student a FAPE when it failed to timely convene an IEP team meeting to review and revise the IEP following completion of the evaluation in March 2012. The Petitioner was represented by counsel and could, and did, challenge the unwritten refusal to convene the meeting, which resulted in a meeting being held but no changes to the inappropriate IEP. It is the inappropriate IEP and placement that denied the Student a FAPE, not the delay in the IEP team meeting. Complaint #2012-0543 is dismissed with prejudice.

VIII. ORDER

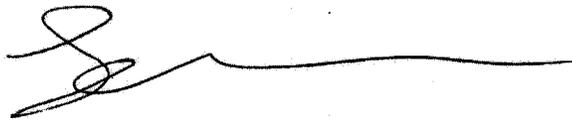
1. The Student's IEP will be revised to include academic and functional support services in a residential treatment facility. The Respondent will draft this change within five school days of the date of this order.
2. The Student will be placed and transported to the Devereux Georgia Treatment Network, or similar program identified by the Respondent if Devereux no longer will accept the Student, for up to one year, or for as long as determined necessary by recommendation of the

residential treatment team. This placement must be effectuated no later than October 29, 2012.

3. Following the discharge of the Student from the residential facility, compensatory education services will be provided including parent counseling and training to assist the Student's Parents and Caretakers in understanding Student's special needs, as well as psychological services that include planning and managing a program of psychological services, including psychological counseling for the Student and Parents. These services will be available to the Family for up to one year following the Student's discharge and will include the opportunity for 120 minutes per month of both types of direct compensatory related services, together. (Not 120 minutes per month for each type of direct service).⁸⁸ The compensatory services will begin within 14 days of the Student's discharge.⁸⁹

IT IS SO ORDERED.

Date: September 29, 2012



Jim Mortenson, Independent Hearing Officer

⁸⁸ Parent counseling and training is a direct service, as is psychological counseling for the Student and Parents. Managing the program of psychological services is an indirect service and no specific amount is stated here in order to ensure the Respondent can adequately manage the direct services ordered without being arbitrarily limited.

⁸⁹ It is expected that the Respondent will be aware of the discharge date prior to it occurring and will therefore have the opportunity to prepare for the compensatory services to begin.

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).