

DC Office of the State Superintendent of Education

Office of Review & Compliance

Student Hearing Office

1150 5th Street, S.E.
Washington, D.C. 20003

CONFIDENTIAL

<p>STUDENT¹, by and through Student's Parent</p> <p>Petitioners,</p> <p>v.</p> <p>DCPS</p> <p>Respondent.</p>	<p>2012 OCT - 1 AM 10:13</p> <p>OSSE STUDENT HEARING OFFICE</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>Case No: 2012-0495</p> <p><u>Representatives: Renee Murphy, Laura Onkeles-Klein, and William Jaffe</u></p> <p><u>Impartial Hearing Officer:</u> Joseph Selbka</p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. Introduction and Procedural Background

1. Student is a [REDACTED] with multiple disabilities. Student is technically in 5th Grade but reads and writes at a first grade level (Educational Advocate Testimony). Student has a learning disability. *Id.* Student has attention deficit hyperactivity disorder. *Id.* Student also has multiple behavioral issues which manifest in the classroom (Social Worker Testimony, Educational Advocate Testimony). Student's primary eligibility designation is learning disability, but he has numerous services and accommodations for the other aspects of his disabilities.
2. The Circumstances which prompted this hearing was a claim that the 2010-2011; 2011-2012 and 2012-2013 IEPs were inappropriate; the Student's triennial evaluation was inappropriate; Student's 2011-2012 IEP was not implemented properly; that the District unilaterally changed the placement; and that the Parent's right to participate in the provision of FAPE for her child was inhibited by District actions.
3. The parties agree that the complaint was filed on July 19, 2012. The parties have conducted a resolution meeting on August 2, 2012, while the thirty day timeline ended on August 18, 2012. The parties have not agreed to shorten or waive the resolution period. Accordingly, the parties agree that the 45-day timeline shall start to run on August 19, 2012. Accordingly, a final decision shall be due on October 2, 2012.
4. The District filed a response on July 30, 2012, an amended response on August 10, 2012, and a second amended response on August 24, 2012 (upon various orders by the undersigned).
5. A prehearing conference occurred on August 9, 2012, which resulted in a prehearing order that issued on August 14, 2012. The hearing occurred on September 12, 2012 in Room 2003 of the Student Hearing Office and September 13, 2012, in Room 2009 of the Student Hearing Office. The Parent called four witnesses: Parent, Independent Investigator, Educational Advocate, Educational Director. Parent Exhibits ##5-13, 16-26, 33-56, and 63-66 were admitted into evidence without objection. Parent Exhibits ##1-4, 14-15, 27-32, and 57-62 were admitted into evidence over the District's objection. The District offered no exhibits. The District called one witness, School Social Worker. Renee Murphy and Laura Onkeles-Klein represented the Parent. William Jaffe represented the District. The hearing was closed to the public. Closing arguments occurred, not closing briefs.
6. At the prehearing conference and beforehand, Parent's counsel unequivocally stipulated that Parent: (1) was not making any claim nor seeking any remedy for a change of placement for disciplinary removals; (2) was not making any claim nor seeking any remedy from a failure to have a manifestation determination conference; and (3) Parent was not making any claim nor seeking any remedy for any wrongful determination arising from a manifestation determination conference. That stipulation was placed in the prehearing order and the Parent made no objection to the prehearing order related to the stipulation. The parties furthermore agreed that no issues presented in the pending complaint should be expedited. As such, the undersigned will make no findings or conclusions in regard to those issues.

7. Parent filed a stayput motion and motion for partial summary judgment on August 17, 2012. The District responded on August 24, 2012. The undersigned entered a stayput order granting Parent's Stayput Motion and denying Parent's Motion for Partial Summary Judgment on August 29, 2012.

8. The District filed a partial motion to dismiss based on the statute of limitations which was denied on August 24, 2012. The Parent responded on August 29, 2012. The undersigned however allowed for the issue of statute of limitations to be heard at hearing.

9. Parent filed a motion to compel production of records on August 21, 2012. The District provided a sworn affidavit that all records had been produced to Parent on August 31, 2012, and the Parent thereafter withdrew her motion.

10. The Parent objected to various portions of the prehearing order on August 17, 2012. The undersigned issued a clarification on August 29, 2012, and denied the remainder of the objections thereafter.

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

II. Issues to be Decided

12. The issues raised by the Petitioner are:

Issue #1- Whether the District failed to reevaluate when it appeared Student was making no progress from July, 2010, to the present and whether this is a procedural violation of IDEA. Specifically, the Parent contends the District should have known that Student needed a comprehensive psychological evaluation; an OT evaluation; an audiological processing evaluation; a FBA; and neuropsychological testing.

Issue #2- Whether the District failed to comprehensively and timely reevaluate Student for his triennial reevaluation and whether this is a procedural violation of IDEA. Specifically, the Parent argues that the triennial evaluation should have included comprehensive psychological evaluation; an OT evaluation; an audiological processing evaluation; a FBA; and a neuropsychological testing; and a speech language evaluation.

Issue #3- Whether the District failed to design an appropriate IEP from July, 2010 to the present. Specifically, the Parent contends that the IEP didn't have the proper goals (the goals the District used were based on grade level standards- not on Student's present levels or his needs; and that all of the IEP goals were not individualized); the IEP required more intensive services (Student needs and needed more speech language, more specialized instruction, more counseling services, and an out- of- general- ed placement); the IEP does not contain and never did contain a BIP; Student needs and needed additional accommodations necessary to deal with distractions and the level and severity of his disability; the IEP needs and needed additional assistive technology for Student to cope with distractions

in the classroom; and the District denied Student ESY services which were needed to provide Student FAPE.

Issue #4- Whether the District denied FAPE by failing to review and revise the Student's IEP to address Student's behaviors in the classroom and lack of meaningful progress in all areas. Specifically, the IEP should have been revised to correct the deficiencies set forth in Issue #3.

Issue #5- Whether the District Changed Student's placement unilaterally by advancing him from Fourth Grade to Sixth Grade without input from the Parent

Issue #6- Whether the District denied FAPE by failing to conduct an annual IEP review in December, 2010.

Issue #7- Whether the District denied FAPE by failing to implement the IEP. Specifically, the Parent contends that the District failed to provide speech and language services as required by the IEP.

Issue #8- Whether the District failed to provide an appropriate placement for Student. Specifically, the Parent contends that the District provided an inappropriate IEP (for the reasons set forth in Issue #3); Student needed and needs an out of general-ed location of services, the District failed to provide intensity of services for Student receive FAPE; Student needed and needs a smaller ratio of students to receive FAPE; Student needed and needs embedded social work services to receive FAPE; Student needed and needs embedded speech and language services to receive FAPE; Student needed and needs accommodations and services regarding attention issues to receive FAPE; and the District failed to conduct evidence based interventions by the special educators in the classroom- which Student needed and needs to receive FAPE.

Issue #9- Whether the District denied FAPE by preventing the parent from participating the decision making process to provide FAPE for Student. Specifically, by conducting evaluations and reevaluations without notice or consent; withholding educational records from the Parent; changing Student's grade unilaterally without participation in this decision; and delaying access to the classroom for Parent's independent evaluator (Parent's evaluator was not provided access to the classroom until last week of school- where there was no instruction going on. According to Parent, this prevented the evaluator from conducting an appropriate observation.

III. Findings of Fact

13. Student reads and writes at approximately a first grade level (P-11-1). His math skills are currently at approximately first grade level (p-11-1).

14. Student is also behind in his social and emotional development and social skills (Educational Advocate Testimony, P1-2, P11).

15. Student has been placed at Moten or Moten at Wilkinson School since he was in Kindergarten. He was retained for First Grade (Parent Testimony). Student receives approximately 10 hours of special education instruction plus any speech and language and social work (P11, Educational Advocate Testimony).

16. In or about July 24, 2012, the District assigned as Student's location of services Johnson Middle School (Parent Testimony, P49). This would mean Student would be placed with age appropriate peers for the time the District intended to mainstream Student (Parent Testimony). At hearing, the District stipulated that it was not going to send Student to Johnson Middle School under any circumstances (District counsel stipulation). However, the District provided no evidence (other than the fact that Parent, a layperson, liked Prospect Learning Center) as to the appropriateness of the District's new proposed location of services, Prospect Learning Center. The District also presented no evidence of a prior written notice for Student to attend Prospect Learning Center. Moreover, Student never attended Johnson Middle School due to the stay put order entered by the undersigned.

17. Student has had behavioral incidents since he has been at Moten/Moten at Wilkinson (School Social Worker Testimony). In the 2011-2012 school year and now in the 2012-2013 school year, Student has been suspended on multiple occasions (Parent Testimony, School Social Worker Testimony, Educational Advocate Testimony). Student has threatened teachers, hit teachers and bullied other students (School Social Worker Testimony, Educational Advocate Testimony). Although Student's behavior seemed to improve slightly at the end of the 2011-2012 school year due to a change in his medication (School Social Worker Testimony), he continued to have severe behavioral problems in the beginning of the 2012-2013 school year (Educational Advocate Testimony, School Social Worker Testimony).

18. Standardized testing reveals that Student has the cognitive potential to read, write, and do math at grade level with the appropriate accommodations and supports (P21-2).

19. The School Social Worker has provided counseling services to Student and behavioral supports to Student in order to have Student better cope with his behavioral issues in school (School Social Worker Testimony). Student has been making some progress in his social-emotional development due to the School Social Worker's counseling and interventions (School Social Worker Testimony).

20. Student also requires speech and language services pursuant to his IEP. Educational Advocate testified that school personnel informed Educational Advocate that Student was not receiving speech and language services (Educational Advocate Testimony). The District provided no evidence (either testimony or service trackers) to contradict Educational Advocate's testimony.

21. Parent claimed to have problems obtaining school records for Student (Parent Testimony). However, Parent obtained all school records prior to the hearing (Parent Counsel Statement withdrawing motion for records).

Facts Related to Student's IEPs

22. Student had an IEP prepared for him on or about January 11, 2010 (P14). Parent received the IEP soon after it was drafted (Parent Testimony).
23. Student received a new IEP in December, 2010 after an annual review (P17). No evidence to the contrary was provided.
24. Student received a third IEP in November, 2011 (P22) after his annual review.
25. Student's three IEPs are relatively similar (P14, P17, P22). The first two IEPs contain the same number of hours in special education and similar accommodations. *Id.* The third IEP contains a slight increase in special education services. *Id.* There is no indication that the District tried anything significantly different in order to successfully provide Student with an educational benefit. *Id.* There is also no indication that the District chose to reevaluate Student at any point other than in the scheduled triennial reevaluation.
26. Student's 2011-2012 and 2012-2013 IEP contained reading and math goals which are not matched to his ability (Educational Advocate Testimony). Student's reading goals in his IEP are inappropriate for Student because they are designed for a student with more advanced skills in reading (Educational Advocate Testimony). Thus, the expected goals and benchmarks require progress far out of proportion to what Student is currently capable of (Educational Advocate Testimony).
27. None of Student's IEPs contain writing goals or occupational therapy goals even though Student has serious problems with writing (Educational Advocate Testimony).
28. Student has no behavioral intervention plan (Educational Advocate Testimony) despite a long record of behavioral problems in the classroom (Educational Advocate Testimony, School Social Worker Testimony). The District presented no evidence as to what behavioral interventions were considered during the various IEP meetings to deal with Student's behavioral problems. Student's recent evaluation recommended a behavior intervention plan, but none was ever completed (P7-4).
29. Because there has never been a functional behavior assessment, it is difficult to determine Student's present levels of performance in social and emotional functioning (Educational Advocate Testimony). Thus, it is difficult to determine social-emotional goals for Student (Educational Advocate Testimony).
30. Student did not receive ESY as part of his January, 2010 IEP (P14). Parent knew Student would not receive ESY by June, 2010 (Parent Testimony). Parent received the January, 2010 IEP in January, 2010 (Parent Testimony). The January, 2010, IEP did not contain a writing goal or address Student's writing problems (P17). Parent did not agree with the January, 2010 IEP when she received it (Parent Testimony).
31. According to the Parent's Educational Advocate, Student's January, 2010, IEP should have been reviewed and revised in March, 2010 (Educational Advocate Testimony).

Facts Related to Student's Recent Triennial Evaluation, Independent Evaluation, Previous Evaluations, and Parent's Requests for Records

32. As early as 2008, Student should have been evaluated for problems with visual-motor integration as his problems with writing were obvious (Educational Advocate Testimony).
33. Parent was aware of Student's behavioral problems at school long before July, 2010 (Parent Testimony).
34. Although there was a prior written notice for Student's reevaluation (P6), Parent claims not to have received it (Parent Testimony). Parent also claims to never have consented to Student's reevaluation, but Parent Counsel admitted that Parent wanted the District to complete a comprehensive reevaluation of Student (Closing Argument Admission). Moreover, the Parent sued the District in this due process proceeding complaining of the District's failure to conduct a complete, timely, and comprehensive reevaluation (Due Process Complaint, Prehearing Order).
35. Student was evaluated pursuant to a triennial evaluation in late 2011 (P9).
36. The District has never conducted a functional behavior assessment despite Student's multiple behavioral issues in the classroom (Educational Advocate Testimony).
37. The District reviewed Student as part of the triennial evaluation (P7). The District's school psychologist indicated that a comprehensive evaluation should include additional cognitive testing including nonverbal, fine motor coordination, social-emotional, executive functioning, and auditory and phonological processing (P7-5). The District records revealed that additional evaluations were never completed (Educational Advocate Testimony).
38. Student also needs a functional behavior assessment to deal with Student's behavioral problems in the classroom and allow the District to draft a behavioral intervention plan (Educational Advocate Testimony).
39. Student also may have issues with visual motor integration (due to his problems with writing) and he needs an evaluation in that area as well (Educational Advocate Testimony).
40. Educational Advocate had problems attempting to set up an independent evaluation due to scheduling conflicts and nonresponsiveness of District staff (Educational Advocate Testimony). However, Educational Advocate was able to observe Student and prepare an expert report and testify in time for the due process hearing in this matter (Educational Advocate Testimony).
41. Parent and her counsel attempted to obtain Student's school records on repeated occasions, and the District did not provide records within 45 days of Parent's first request for records (P36-P39, P44, P45, P47-P48, P51). The District ultimately provided all records within its control to Parent's counsel prior to the due process hearing in this case (P56).

Qualifications of Various Witnesses

42. Student's Educational Advocate has a master's in special education; has been an educator; an advocate; an administrator and a consultant for special education programs for nearly 30 years (P66). Educational Advocate also has published numerous papers and provided presentations on special education (P66). Educational Advocate's complete CV is located at P66.

43. School Social Worker is a licensed school social worker who has been involved in providing special education for nearly 9 years. She has a degree in social work (School Social Worker Testimony).

44. Educational Director has a master's degree in special education and has been an educator and administrator of children with disabilities for many years (Educational Director Testimony).

Facts Related to Student's Progress and the Least Restrictive Environment

45. Student requires research based reading classes in order to achieve a reasonable educational benefit and learn how to read (Educational Advocate Testimony). The only way to provide such a research based reading class would be in a completely out of regular education placement (Educational Advocate Testimony, P7-2).

46. Student is so far behind his peers that he needs ways to simultaneously develop reading, writing, and math skills while obtaining grade level information (Educational Advocate Testimony).

47. Student's cognitive ability assessments indicate Student could have reading and math skills at grade level (P21-2, Educational Advocate Testimony). However, Student reads, writes, and his math levels are approximately at 1st grade level (P7-2, Educational Advocate Testimony). Reasonable progress for a childlike Student should be at least one grade level per year and can be more depending on the methodology available (Educational Advocate Testimony).

48. Student has made, at best, minimal progress in reading, writing, and math for the past two years (P7-3, Educational Advocate Testimony). He has not made a year's progress for each year in school over the past two years (Educational Advocate Testimony). In some areas, Student may have actually regressed (Educational Advocate Testimony).

49. Student has made some social-emotional progress for the past two years (School Social Worker Testimony). However, Student has no friends at school and has not interacted well with his peers (Parent testimony).

50. Moreover, Student's behavior has consistently been problematic at school for the past two years (P7-2, Parent Testimony). Student has been suspended on multiple occasions and his behavior has escalated and become violent in the past year (Educational Advocate Testimony). Student's behavior has been better at the end of the 2011-2012 school year because he started taking medication (District Social Worker Testimony). However, Student still has violent episodes and behavioral referrals which resulted in another suspension (Educational Advocate Testimony, District Social Worker Testimony).

51. Student also needs a much smaller class size in order to allow for staff to address behavioral issues and to provide direct instruction to Student (P7-2, Educational Advocate Testimony, District Social

Worker Testimony). Student needs behavioral interventions in the classroom so as to teach Student to monitor his attention and emotional states and to stay on task (P7, Educational Advocate Testimony).

52. Student also finds large classes and nondisabled students to be threatening at this time (Educational Advocate Testimony). Student has problems concentrating on work because of activity levels in a general education classroom (P14-8, P17-10, P22-11)- as the District has noted for years.

53. Student's speech language testing shows he is severely below average in language skills (P7-2, P8).

54. By December, 2010, the District should have realized that Student was making little or no progress (Educational Advocate Testimony). Similarly, by November, 2011, of his school year, Student had made little or no progress, and the District should have been aware of this (Educational Advocate Testimony).

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

55. At the hearing, the District stipulated that Student would not be sent to the proposed location of services, Johnson Middle School (Admission of District Counsel).

56. The Director of Kingsbury School ("Proposed Private Placement") testified at the hearing (Educational Director Testimony). Educational Director testified that Proposed Private Placement has many similar students to Student; that Proposed Private Placement can provide Student with an educational benefit through research based reading programs, assistive technology; and personalized instruction; can teach Student as to reading; that Proposed Private Placement can provide students with Student's disabilities with needed related services; that Proposed Placement's teachers can cope with Student's behavioral issues; that Proposed Private Placement can provide Student with and can provide Student with needed behavioral support services to deal with Student's distractibility and aggression (Educational Director Testimony). The Proposed Placement can implement Student's IEP with the exception of the current least restrictive environment determination (Educational Director Testimony).

57. Proposed Private Placement is certified by OSSE (Educational Director Testimony). Proposed Private Placement charges tuition at the rates as set by OSSE (Educational Director Testimony).

58. The District presented no evidence that Proposed Private Placement is inappropriate. The District presented no evidence of any public placement or location of services capable of providing Student with FAPE. The District claimed it was going to provide evidence of an appropriate public location of services, and the undersigned overruled the Parent's objection to the District's request (District Counsel Testimony, Parent Counsel Admission). However, when given such an opportunity, the District failed to provide a witness with any knowledge of any appropriate location of services for Student in the District (District Case in Chief).

59. Educational Advocate testified that Student could learn best by being with students of similar ages but similar reading levels.

60. Proposed Private Placement will place Student in a classroom with middle school students because he appears to be more likely to be able to interact with older students and they are age appropriate to him (Educational Director Testimony). Proposed Private Placement also provides social skills training during specials and lunch (Educational Director Testimony).
61. Educational Advocate testified that Student would need 125 hours of tutoring in order to make up for lost educational opportunity arising from the failings of the January, 2010, IEP and failure to revise the January, 2010, IEP (Educational Advocate Testimony) and 65 hours of tutoring to make up for loss of ESY in the 2010 summer (Educational Advocate Testimony) .
62. Educational Advocate testified that Student would need 220 hours of tutoring to make up for lost educational opportunity arising from the design flaws of the December, 2010, IEP and the failure to revised said IEP and reevaluate the Student (Educational Advocate Testimony) and 65 hours of tutoring to make up for loss of ESY in the 2011 summer (Educational Advocate Testimony).
63. Educational Advocate testified that Student would need 326 hours of tutoring to make up for the lost educational opportunity for violations of FAPE arising from the design flaws from the November, 2011, forward (and related failures to revise the IEP and reevaluate when Student was not making progress (Educational Advocate Testimony) and 65 hours of tutoring to make up loss of ESY for the 2012 summer (Educational Advocate Testimony).
64. Educational Advocate testified that Student needs 18 hours of behavioral intervention therapy and 18 hours of counseling to compensate Student for lost educational opportunity associated with the design flaws in the IEP related to lack of social-emotional services and a behavioral intervention plan (Educational Advocate Testimony).
65. Educational Advocate testified that 36 hours of speech and language services would compensate Student for the loss of speech and language services over the course of the 2011-2012 school year.
66. Educational Advocated testified that Student needs goals in decoding words and reading fluency in order to obtain FAPE (Educational Advocate Testimony).
67. Educational Advocate testified that Student needs goals in related to his social-emotional development and behavior to achieve FAPE (Educational Advocate Testimony).
68. Educational Advocate testified that Student needs a placement with the following characteristics: a small classroom which would make accommodations and interventions possible; accommodations (including visual presentations of materials rather than simply auditory); preferential seating; technology available to him that allows him to get content without being impacted by his disability (specifically, he needs to hear grade level content (because he can't read)); speech detection software; scribe software; he has to have the ability to keyboard effectively (so he needs software programs which allow students to type what they're trying to say); repetition of instruction; related services providers acting as a team; related services providers working on same goals and teaching same

things- related service providers should work with the other teachers; rapid interventions; needs a strong speech component (speech and language support in and out of the classroom); interaction with a psychologist for counseling; a behavior intervention plan; social skills training (training in social interactions); and communication with home.

IV. Conclusions of Law

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

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

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

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

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

74. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Bray v. United States*, 306 F.2d 743 (D.C. Cir. 1962); *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. Ct. of App. 1985). Hearing officers can make reasonable inferences from the evidence adduced at hearing. *Dell, supra*. However, like in all administrative adjudications, the inferences must be supported

by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Charles v. Astrue*, 2012 WL 1194707 (D.D.C. 2012).

75. A factfinder is entitled to draw an adverse inference when a party has peculiar knowledge and ability to provide a pertinent piece of evidence or testimony and inexplicably fails to provide the evidence in question. *Cite*

76. Expert opinions are admissible if the experts are considered qualified through either training or experience. *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962). To the extent the hearing officer relies upon expert opinions, the expert opinions must be inferred ultimately from facts in the record, and the inferential process by which an expert reaches his/her conclusions must be fully explained. *Giant Food Stores, Inc. v. Fine*, 269 F.2d 542 (D.C. Cir. 1960) (expert testimony must be grounded by material facts in the record); *The Nereide*, 9 Cranch 388 (1815) (in litigation, witnesses must testify as to the train of their inferential reasoning).

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

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

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

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

In administrative litigation, the hearing officer must be concerned with not only ensuring a fair process wherein the parties can present evidence, but also a proper result under the law because there is a significant public interest in properly having the law carried out. Landis, John, "*The Administrative Process*," Yale University Press (1938) excerpted in Foundations of Administrative Law, Schuck, Peter

(ed.) Foundation Press (2004), pp. 13-14. For this reason, administrative hearing officers are constitutionally permitted to depart from the adversarial model and independently obtain evidence and develop an administrative record while remaining a neutral and impartial decision maker. *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000); *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971) (social security administrative law judges constitutionally permitted to develop the record to determine all facts necessary whether benefits should be granted under law).

Conclusions Related to IEP Design and Revision

81. Student is entitled to an IEP designed to provide a Free Appropriate Public Education ("FAPE"). FAPE is defined as an educational placement reasonably calculated to provide Student with an educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The District need not provide a program designed to maximize Student's educational potential. *Id.* Rather, the District only needs to provide a program designed to produce substantial educational progress. *Id.*

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

83. Although a district is not required to maximize a student's potential, a reasonable calculation of an educational benefit is gauged using a student's potential- even though the District is not required to maximize a student's potential in designing an IEP. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3rd Cir. 1999).

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

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

86. However, a District is not entitled to use an IEP which is not producing progress for years on end. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692 (10th Cir. 1998). Moreover, a District must revise an IEP when the IEP is obviously failing to produce progress or in any other situations when it would be appropriate to do so. *M.M. v. Special School District No. 1*, 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008).

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

88. Thus, in order to provide substantive FAPE, an IEP must establish goals which respond to all significant facets of a student's disability, both academic and behavioral. *Sarah D., supra*. When a student has a learning disability, the goals must address the student's learning disability. *Pennsbury School District*, 48 IDELR 262 (PA SEA 2007). When a student has deficits related to attention and behavior in the classroom, the District must have goals to address those aspects of the student's disability. *Bellflower Unified School District*, 54 IDELR 66 (Cal. SEA 2010).

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

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

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

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

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

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

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

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

97. Failure to design an IEP with an appropriate BIP can be a denial of FAPE like any other design failure in an IEP. *Neosho R-V School District v. Clark*, 38 IDELR 61, 315 F.3d 1022 (8th Cir. 2003). When behavior problems interfere to an extent that a child loses academic benefits due to behavior problems, a district needs to provide a cohesive plan to address the child's behavior problems. *Id.* To fail to do so results in a loss of FAPE. *Id.*

98. An IEP must be revised "as appropriate" when a district knows or should know that the IEP is clearly failing. 34 CFR 300.325(b); *M.M. v. Special School District No. 1*, 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008).

99. Student must also be educated in the least restrictive environment appropriate. 34 CFR 300.114(a)(1). Districts must educate disabled students with their nondisabled peers to the maximum extent appropriate, and separate classes or schools are only permissible if the nature or severity of the disability is such that a student cannot be educated with his/her nondisabled peers satisfactorily (even with accommodations and aids). 34 CFR 300.114(a)(2).

100. Thus, in determining whether a student needs a more restrictive environment, the ultimate question is whether the education in the conventional school was satisfactory, and, if not, whether

reasonable measures would have made it so.” *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002). In determining whether Student is receiving a satisfactory education, some factors which the undersigned uses to evaluate the placement are: (1) whether a segregated placement is superior, and if so, whether the services which make the segregated placement superior can be replicated in the classroom, *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); (2) whether there are educational benefits to mainstreaming, *Sacramento v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994); (3) whether there are non-academic benefits to mainstreaming, *Id.*; (4) whether there is an effect of mainstreaming on the regular classroom, *Id.*; (5) whether there are other costs to the school district; (6) whether there is a danger that the student is in danger of causing physical harm to himself or other students in the regular classroom, 34 CFR 300.116(d), *School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002); (7) whether the student is disruptive to her classmates in a regular education classroom. *Z.S.*, *supra*, 295 F.3d at 672; *MR by RR v. Lincolnwood Board of Education District 74*, 843 F.Supp. 1236, 1238 (N.D. Ill. 1994) citing numerous cases.

101. Under certain circumstances, a district must provide extended school year services to provide a student FAPE. 34 CFR 300.106. In the District of Columbia, ESY is only necessary if the student faces a significant risk of having the gains of a school year jeopardized if the student is not provided with ESY. *Jackson-Johnson v. District of Columbia*, 59 IDELR 101 (D.D.C. 2012); *Jackson-Johnson v. District of Columbia*, 112 LRP 36774 (D.D.C. 2012)². Regression-recoupment problems triggering the need for ESY occur when: A child suffers an inordinate or disproportionate degree of regression during the summer break; and it takes an inordinate or unacceptable length of time for the child to reoup the lost skills upon returning to school. *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986).

Conclusions of Law Related to an Appropriate Location of Services

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

Conclusions of Law Related to Failure to Evaluate

103. Students must be reevaluated when the District determines that the child’s educational and related services needs require reevaluation and, at a minimum, once every three years. 34 CFR 300.303(a),(b)(2).

104. The District must generally issue a prior written notice before evaluating, 34 CFR 300.300(a), and the Parent must generally consent to the reevaluation. 34 CFR 300.300(c).

² Other Circuits have adopted a much broader set of reasons why ESY might be necessary. *See Johnson v. Independent School District No. 4*, 17 IDELR 170 (10th Cir. 1990). The D.C. Circuit Court of Appeals has not yet ruled on this issue, and therefore the undersigned treats the district court rulings on this issue as binding precedent until the D.C. Circuit Court of Appeals chooses to address this matter.

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

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

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

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

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

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

services are needed to enable the child to meet the measurable annual goals set out in the IEP. 34 CFR 300.305(b).

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

110. The District must administer assessments which assess specific areas of educational need and not merely to provide a single general intelligence quotient. 34 CFR 300.304(c)(2).

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

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

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

Conclusions of Law Related to Implementation of IEPs

114. Material violations of a student's IEP will be a denial of FAPE and a violation of IDEA for which a parent and student can obtain redress in a due process hearing. *Savoy v. District of Columbia*, 58 IDELR 129 (D.D.C. 2012); *See also Sumter County School District 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011); *Van Duyn v. Baker School District 5J*, 502 F.3d 811, 822 (9th Cir. 2007); *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1027, nt. 3 (8th Cir. 2003); *Houston Independent School District v. Bobby R*, 200 F.3d 341, 349 (5th Cir. 2000).

115. A district must comply with the terms of the IEP to deliver FAPE. *Board of Education of the City of Chicago v. Illinois State Board of Education*, 55 IDELR 133, 741 F.Supp.2d 920 (N.D. Ill. 2010). Therefore, “. . .The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail in an implementation failure claim, although the child’s educational progress, or lack of if, may be probative of whether there has been more than a minor shortfall in the services provided.” *L.J. v. School Board of Broward County, Supra, See also, Board of Education of the City of Chicago, supra*. The reason for this rule is to prevent a district from drafting an elegant IEP and then ignoring it until the parents can prove an educational harm. *Board of Education of the City of Chicago, supra*.

116. The District must implement the IEP as written, and cannot change the written requirements of the IEP without an amendment of the IEP by the IEP Team. *Independent School District No. 281 v. Minnesota Department of Education*, 48 IDELR 222, 107 LRP 56347 (Minn. Ct. App. 2007).

117. In considering whether an IEP is being implemented properly, the snapshot rule should not apply where a school district has discretion to change tactics and methodologies to provide a student with an educational benefit. *O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692 (10 Cir. 1998). An IEP is a program consisting of both the written IEP document and the subsequent implementation of that document. *Id.* The implementation of the IEP document is an on-going, dynamic activity, which must be evaluated as such. *Id.* Thus school districts cannot implement an IEP document in a way which is clearly failing. *Id.*

Conclusions of Law Related to Procedural Violations of IDEA Alleged in the Complaint and Other Miscellaneous Legal Conclusions

118. Although the School District must comply with the procedural requirements of IDEA, hearing officers can only enter an order against the District if the procedural inadequacies: (1) impeded the Student’s right to a free appropriate public education; or (2) denied the student some educational benefit; or (3) significantly impeded the parents’ ability to participate in the decisionmaking process regarding the provision of a free appropriate public education. 20 U.S.C.A. 1415(f)(E)(ii)(I-III).

119. Parent is entitled to all school records within the District’s possession within 45 days of request thereof and/or prior to an IEP meeting or resolution meeting. 34 CFR 300.613.

120. In general, whether observations in the classroom (by parents or their surrogates) are allowed are matters of state law and regulation. *Letter to Mamas*, 42 IDELR 10 (OSEP 2004); *School Board of Manatee County, Florida v. L.H.*, 666 F.Supp.2d 1285, 53 IDELR 149 (M.D. Fl. 2009).

121. The structure of IDEA requires that parents be able to have an independent evaluator determine whether a student requires different services than those offered by the school district. 34 CFR 300.502; *Forest Grove School District v. T.A.* 557 U.S. 230, 52 IDELR 151 (2009).

122. As such, a district is required under federal law to allow parents' independent evaluators to evaluate a student in his/her school environment. *School Board of Manatee County, Florida v. L.H.*, 666 F.Supp.2d 1285, 53 IDELR 149 (M.D. Fl. 2009).

123. Parents must file their due process complaint alleging violations of IDEA within two years of the time the parents knew or should have known of the alleged action which forms the basis of the complaint. 20 U.S.C. 1415(f)(3)(C). The timeline begins to run when the parent knew or should have known about the injury to the child. *Centennial School District v. S.D.*, 58 IDELR 45 (E.D. Penn. 2011), *R.B. v. Department of Education of the City of New York*, 57 IDELR 155 (S.D.N.Y. 2011). *Mittman v. Livingston Township Board of Education*, 55 IDELR 139 (D.N.J. 2010); *Gwinnett County School District v. A.A.*, 54 IDELR 316 (N.D. Ga. 2010).

Conclusions Related to Parents' Remedies

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

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

126. The undersigned is also entitled to place a student in a private placement/location of services as compensatory education or if the equities of a situation require such a finding when a district failed to provide a student with FAPE. *Branham v. District of Columbia*, 44 IDELR 149, 427 F.3d 7 (D.C. Cir. 2005). See also *Draper v. Atlanta Independent School System*, 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008). If a District cannot or will not provide a Student with FAPE, the undersigned is able to place Student in a private location of services/private placement. *Id.*

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

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

Discussion Related to the District's Alleged Failure to Evaluate and IEP Design Issues

128. The undersigned finds that Parent knew of the alleged flaws in the January, 2010, IEP at or near the time the IEP was drafted. The undersigned bases this finding on the admissions of Parent to that effect. The undersigned also finds that the Parent knew or should have known that the IEP was not revised as of March, 2010, based upon the lack of any notices to that effect. Finally, the undersigned finds the Parent knew that Student was not to receive any ESY for the 2010 summer by June, 2010 based upon her admission to that effect.

129. The undersigned finds that, therefore, all violations of FAPE related to the design or failure to revise the January, 2010, IEP are barred by the statute of limitations. The injuries (i.e. alleged loss of FAPE) occurred at the times the decisions were made (to design the IEP, not to revise the IEP, not to provide ESY) All such decisions were made more than two years before Parent filed her complaint. Moreover, Parent knew or should have known of the decisions soon after they were made as discussed above. As such, any claim for failure to design the January, 2010, IEP; revise the January, 2010, IEP, and any claim for ESY in 2010 are barred under the statute of limitations. The undersigned rejects Parent's claim that a continuing duty to revise somehow preserves Parent's claims. Rather, the statute of limitations should accrue when the Parent first suffers an injury and knows about the injury. In making this finding, the undersigned relies upon the purpose of the statute of limitations which is to ensure that Parents bring claims quickly and that violations of the law are addressed quickly. *R.B. v. Department of Education of the City of New York*, 57 IDELR 155 (S.D.N.Y. 2011).

130. The undersigned makes a credibility finding in favor of Educational Advocate and against the District that Student can make a year's academic progress in a year with the appropriate supports, accommodations, and instructional methodology. The undersigned bases this credibility finding on the testimony of Educational Advocate describing Student's disabilities and a proposed placement designed to address Student's disabilities as well as District documents which admit Student could be at grade level in academic performance despite his disabilities.

131. In light of the above stated credibility finding, the undersigned makes an inference that the District's actions in failing to significantly change the IEP and reevaluate Student in December, 2010, and November, 2011 were unreasonable. The District continued to design and implement an essentially identical IEP after the IEP failed to produce appropriate progress for Student for an entire school year, and then made de minimus changes thereafter. The fact the January, 2010 IEP failed to produce appropriate progress should have triggered a reevaluation and an effort to significantly change Student's placement to provide him with a reasonable educational benefit. Instead, the District continued with the same failing strategies and programs with the same predictable results—Student failed to make more than minimal progress over the course of the second half of the 2010-2011 school year and the entire 2011-2012 school year. The District provided no reason why it continued with a failing set of programs for so long. Moreover, District personnel responsible for Student have all admitted that Student needs a more intense program in a smaller setting. The District repeatedly noted Student does badly in large settings because of distractibility and fear of school- and no one from the District made any attempts to change the Student's educational program to address Student's issues.

132. The undersigned therefore finds that the December, 2010 IEP and the November, 2011 IEP were not reasonably calculated to provide Student with an educational benefit in that the accommodations, supports, and overall placement simply continued a failing educational placement even after that placement was shown by the failure of the January, 2010 IEP to not produce substantial educational progress in Student. The undersigned therefore finds the accommodations and support unable to properly address Student's distractibility and behavioral aspects of Student's disability in his current classroom.

133. The undersigned further makes the inference and finds that the December, 2010, IEP and November, 2011, IEP should have been reviewed and revised within a few months of the IEPs producing only minimal progress. The undersigned makes this inference based upon the testimony of Educational Advocate that two months of minimal progress should trigger an IEP review coupled with clear evidence that Student was unable to master the goals of his IEP consistently should have put the District on notice that Student was not making progress under his IEP.

134. The undersigned makes a further inference that Student's lack of progress after the December, 2010, and November 2011 IEP were adopted should have triggered a reevaluation of the Student in order to determine why Student was unable to make progress under the terms of the current IEP. The undersigned makes this inference based upon the testimony of Educational Advocate that two months of minimal progress should trigger a reevaluation coupled with clear evidence that Student was unable to master the goals of his IEP consistently should have put the District on notice that Student was not making progress under his IEP and he needed to be reevaluated.

135. The undersigned finds that the District failed to comprehensively evaluate Student based on the testimony of Educational Advocate and the evaluation report of the District's own school psychologist who recommended numerous assessments which were not completed. The undersigned finds that the Student needs the assessments noted by the School Psychologist based upon the lack of any evidence to the contrary and the agreement of Educational Advocate. The undersigned finds that Student needs additional cognitive testing including nonverbal, fine motor coordination, social-emotional, executive functioning, and auditory and phonological processing (as well as the assessments mentioned below).

136. The undersigned makes an inference that Student's behavioral problems were obvious and known by the District. Student's behavioral problems thus should have triggered the need for a functional behavior assessment. Specifically, the District should have determined that in light of Student's continuing behavioral problems (over the course of many years) after years of ad hoc counseling and services, a formal assessment to determine the causes of Student's behaviors leading to a cohesive behavior management plan was necessary to address Student's behaviors so as to provide Student with FAPE. After years of continuing behavior problems, it should have been clear that School Social Worker's ad hoc counseling and interventions were not sufficient to provide Student with social and emotional progress and to allow Student to achieve academic progress. Moreover, the District didn't even try to undertake a formal effort to determine the cause of Student's behavioral problems and develop a cohesive plan for addressing Student's behavioral issues.

137. The undersigned finds that Student would need an assistive technology assessment to determine whether Student needs further assistive technology supports.

138. For the reasons that Student needed a functional behavior assessment, the undersigned finds that Student also needed a behavior intervention plan to provide Student with FAPE. In light of the continued failure of ad hoc interventions and counseling, an integrated and cohesive plan was necessary to address Student's behavioral issues.

139. The undersigned further finds that Student needs an occupational therapy assessment in light of Student's problems with visual motor integration which the Educational Advocate noted the District should have been aware of.

140. The undersigned finds that Student's academic goals are inappropriate in that they are designed for a student with much greater reading ability than Student currently possesses, and are not tailored to the aspects of Student's disabilities. Also, Student does not have a writing goal despite his continued problems with writing. The undersigned also finds that Student needs goals related to his behaviors, tasks to attention, and social skills.

141. The undersigned finds that Student needs 90 minutes per week of speech and language services, some of which should be integrated into the curriculum and makes a credibility finding in favor of Educational Advocate based upon his opinion in this regard.

142. The undersigned finds, that in light of the inadequate evaluation (including but not limited to, the lack of a functional behavior assessment), it is impossible to discern the Student's present levels of performance in social-emotional functioning and behaviors in the classroom. As such, it is impossible to determine the appropriate social emotional and behavioral goals for Student.

143. The undersigned makes a credibility finding in favor of the Educational Advocate as to his testimony regarding: the failure of the District to provide appropriate goals; the failure of the District to provide proper present levels of performance; the lack of a behavior intervention plan; the inadequate nature of the intensity of services provided to Student; the inadequate amount of speech and language services provided to Student; and the failure to properly evaluate Student. The undersigned bases this credibility finding on the lack of any testimony to the contrary.

144. In light of the above stated credibility finding; the lack of any evidence to the contrary; Student's clear lack of progress in reading and writing; and Student lack of progress in correcting his behavioral problems; the undersigned adopts the inferences of Educational Advocate regarding the IEP's design flaws in regard to goals; present levels of performance; the lack of intensity of instruction; the inappropriate methodologies; and lack of a behavior intervention plan. Similarly, the undersigned adopts the opinions and inferences of the Educational Advocate as to the lack of comprehensiveness of the District's evaluations. Specifically, the District failed to conduct evaluations necessary to determine the extent of Student's disabilities and/or necessary to determine the needs of Student for special education and related services.

145. The undersigned therefore finds that the Student's December 10, 2010 IEP and November, 2011, IEP were and are fatally defective due to inappropriate goals; inaccurate present levels of performance; insufficient intensity of instruction; inappropriate methodologies; an inappropriate LRE determination; and a lack of a behavioral intervention plan. Because the goals in question were so generally inappropriate for Student's abilities, they, by definition, could not be linked to assessment data or instruction.

146. The undersigned therefore finds that the two IEPs contained inappropriate present levels of performance; inappropriate goals in reading and writing; and inappropriate goals as to Student's social-emotional development.

147. The undersigned finds that Parent failed to prove a need for ESY because it is unclear whether Student is likely to regress and whether the regression is caused by the District's failures to provide FAPE during the year or failure to provide ESY during the summer.

148. The undersigned finds that Parent did not prove the level of counseling services were inadequate based upon the testimony of School Social Worker, Student's modest progress in the area of social-emotional development, and the fact that Educational Advocate testified that the main problem with the IEP was the lack of a BIP. The undersigned finds that embedded social work is either synonymous with an integrated BIP or no evidence was presented that embedded social work services was necessary to provide Student FAPE.

149. The undersigned makes a credibility finding in favor of Educational Advocate that Student needs a placement with the following characteristics: a small classroom which would make accommodations and interventions possible; accommodations (including visual presentations of materials rather than simply auditory); preferential seating; technology available to him that allows him to get content without being impacted by his disability (specifically, he needs to hear grade level content (because he can't read)); speech detection software; scribe software; he has to have the ability to keyboard effectively (so he needs software programs which allow students to type what they're trying to say); repetition of instruction; related services providers acting as a team; related services providers working on same goals and teaching same things- related service providers should work with the other teachers; rapid interventions; needs a strong speech component (speech and language support in and out of the classroom); interaction with a psychologist for counseling; a behavior intervention plan; social skills training (training in social interactions); and communication with home.

150. The undersigned makes a credibility finding in favor of Educational Advocate and against the District (specifically School Social Worker) regarding Student's LRE determination. Specifically, the undersigned finds that Student needs intensive research based reading and writing programs to succeed (Educational Advocate Testimony). The undersigned further makes a credibility finding that there is no way to provide the research based reading and writing programs while with being mainstreamed. The undersigned therefore finds that the segregated placement is superior to the inclusive placement. The undersigned finds that, in light of Student's lack of progress, there is no academic benefit to mainstreaming. The undersigned makes a further credibility finding that Student will obtain no benefit

from partial mainstreaming (for instance of specials) because Student's fear of school has made partial mainstreaming useless at the current point in Student's educational career. Finally, the undersigned finds that in light of Student's behavioral problems, he is disruptive to the class and a danger to others.

151. The undersigned therefore finds that Student requires a placement which is 100% outside of the general education classroom at this time.

152. For the reasons set forth above, the undersigned finds that the District provided an inappropriate placement for Student.

Discussion Related to IEP Implementation Issues

153. The undersigned makes a credibility finding that Student did not receive his speech and language related services over the course of the 2011-2012 school year. The undersigned bases this credibility finding on the testimony of Educational Advocate; the total lack of progress in this area by Student in addressing his speech and language problems; and the fact that the District presented no testimony or records that the speech and language services were provided (even though the District should have that information readily available. To the extent the Student made speech and language services difficult to provide, the District had an obligation to at least try different techniques to implement the IEP. The undersigned finds the District's failure to be a material violation of the IEP.

Discussion Related to the Alleged Procedural Violations (Other than Failure to Evaluate)

154. The undersigned makes a credibility finding against Parent that she received the notices of evaluation and that she consented to the reevaluation. The undersigned bases this credibility finding on the fact that Parent sued the District to conduct a comprehensive reevaluation which is completely inconsistent with a claim that Parent never consented or received notice of the reevaluation. Moreover, the undersigned finds that simultaneously suing the District for a failure to comprehensively reevaluate and to evaluate without consent to be bad faith. The Parent clearly wanted the reevaluation and sued for more evaluations—and to sue for a failure to consent for an evaluation Parent's actions show she consented to is bad faith.

155. The undersigned finds that the District conducted an IEP review in December, 2010, based on District documents showing Student had a new IEP in December, 2010, and the lack of any evidence to the contrary (Parent did not have a clear memory of the timing of IEP meetings and reviews).

156. The undersigned finds that the issue of whether Student's placement would have changed by moving Student to Johnson Middle School is moot because of the stayput order in this matter and the District's stipulation that Student will not be sent to Johnson Middle School.

157. The undersigned finds that the Parent received records prior to the hearing, and that in light of the failure of settlement negotiations prior to hearing, the parties had intractable differences regarding Student's placement. Moreover, the undersigned finds that the denial of records did not cause a loss of FAPE to Student or prevent Parent from participating in the decisions to provide FAPE. Rather, the District's failure to evaluate and design an IEP for Student prevented Parent from participating in the IEP

creation process (by failing to provide enough information to determine how Student can receive FAPE). As such, the District's failure to provide records is not a procedural violation of IDEA where a remedy is available.

158. The undersigned finds that the Educational Evaluator was given access to observe Student and was able to prepare a report. As such, there is no procedural violation of IDEA for failure to allow Parent's evaluator to observe Student and prepare a report.

Discussion Related to Remedies

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

160. The undersigned makes an adverse inference against the District that there is an appropriate public location of services for Student. Specifically, the undersigned finds that appropriate locations of services within the public school system for Student's unique needs are within the peculiar knowledge of the District; that the District was given an opportunity to provide testimony as to an appropriate location of services; and that the District inexplicably failed to provide any such testimony. As such, the undersigned makes an adverse inference against the District that there is no appropriate public location of services for the undersigned to consider placing Student.

161. The undersigned further adopts the opinion of the Educational Advocate that it will require 546 hours of tutoring; 36 hours of speech and language therapy services; and 18 hours of behavioral intervention therapy to compensate Student for lost educational opportunity arising from the District's many denials of FAPE from December, 2010, to the present. The undersigned relies upon the explanation of the Educational Advocate as to how this compensatory education regime will compensate Student for lost educational opportunity. In considering this award, the undersigned considers the conduct of the parties (specifically the behavior of the District in failing to provide Student with FAPE for nearly two entire school years in many different ways); the nature and severity of Student's disabilities as described in the facts section above; the link between Student's needs and the services suggested as testified to by Educational Advocate.

162. The undersigned finds that no compensatory services are necessary for counseling because the District was found not to have denied the Student FAPE in that area.

163. The undersigned finds that the equitable factors require an award of a private location of services. First, the District presented no evidence that it would ever provide Student with an appropriate locations of services. Second, the District presented no evidence that there was a public school which could implement Student's IEP. Third, the District provided no equitable reason of any kind why a private location of services shouldn't be awarded in light of the District's consistent refusal to provide FAPE to this Student in multiple different ways. Fourth, the Proposed Private Placement is appropriate for this Student as testified to by Educational Director given the needs of Student and the

services offered by the Proposed Private Placement. Moreover, there is clearly a link between the services at Proposed Private Placement. Fifth, the Proposed Private Placement charges OSSE approved rates—a rate the SEA finds reasonable.

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

166. The undersigned finds that Student need appropriate goals in reading and writing; social-emotional functioning; behavioral (including attention to task); and appropriate present levels of performance to obtain FAPE.

VI. Order

167. The District has failed to appropriately evaluate Student; the Student's IEP is found to be inappropriate for the December 2010 and November, 2011, IEPs for the reasons set forth in this decision. The District is found to have failed to reevaluate and revise the IEP for the time periods set out in this decision. The District is found to have failed to properly implement the IEP

168. The Parent's other requests are denied.

169. By October 10, 2012, the District shall issue a prior written notice placing Student at Kingsbury School as his location of services for the 2012-2013 school year. The District shall pay for the private location of services and transportation to the new location of services.

170. By October 15, 2012, the District shall begin to conduct: an occupational therapy assessment (including testing for visual motor integration and fine motor issues); a functional behavior assessment; an assistive technology assessment; additional cognitive testing including nonverbal, social-emotional, executive functioning, and auditory and phonological processing. All assessments must be completed within forty-five days of this order.

171. By October 15, 2012, the District shall revise the LRE determination to have a 100% of services outside the general education curriculum.

172. Within fourteen days of completion of all assessments required by this order, the IEP Team shall meet to consider the results of the assessments ordered by this HOD and all other District assessments. The IEP Team shall reconsider and develop appropriate present levels of performance for Student and appropriate goals in reading, writing, mathematics, social emotional development, and behaviors in the classroom. The reading and writing goals must address all aspects of Student's disability. The goals must be connected to assessment data and instructional services must be linked to the newly developed goals. The goals must be measurable. Student's IEP shall be revised to reflect the revised goals and revised present levels of performance. The IEP Team shall also determine what updated accommodations and supports for Student are necessary in light of the new assessments. The IEP Team

shall also determine what related services are necessary in light of the new assessments. The accommodations and supports in the revised IEP must include: small classroom which would make accommodations and interventions possible; accommodations (including visual presentations of materials rather than simply auditory); preferential seating; technology available to Student that allows him to get content without being impacted by his disability (specifically, Student needs to hear grade level content); speech detection software; scribe software; Student has to have services allowing Student to keyboard effectively (so he needs software programs which allow students to type what they're trying to say); repetition of instruction; related services providers acting as a team; related services providers working on same goals and teaching same things- related service providers should work with the other teachers; rapid interventions; needs a strong speech component (speech and language support in and out of the classroom totaling 90 minutes per week); interaction with a psychologist for counseling; a behavior intervention plan; social skills training (training in social interactions); and communication with home.

173. Within twenty-one days of completion of a functional behavioral assessment, the District shall complete a behavior intervention plan for Student.

174. Proposed Private Placement may implement the current IEP (except for the LRE determination and as set forth below) until the revised IEP is available. To the extent the current IEP does not contain the following, Proposed Private Placement will provide the following accommodations and supports: a small classroom which would make accommodations and interventions possible; accommodations (including visual presentations of materials rather than simply auditory); preferential seating; technology available to him that allows him to get content without being impacted by his disability (specifically, he needs to hear grade level content); speech detection software; scribe software; he has to have the ability to keyboard effectively (so he needs software programs which allow students to type what they're trying to say); repetition of instruction; related services providers acting as a team; related services providers working on same goals and teaching same things- related service providers should work with the other teachers; rapid interventions; a strong speech component (speech and language support in and out of the classroom totaling 90 minutes per week); interaction with a psychologist for counseling; behavior interventions until a unique behavioral intervention plan can be formulated; social skills training (training in social interactions); and communication with home.

175. The District shall begin to provide 546 hours of tutoring for Student by October 10, 2012. The tutoring must be completed within three years of the date of this order. The District shall begin to provide 36 hours of speech and language services and 18 hours of behavioral counseling by October 10, 2012. The District shall complete said services by May 31, 2013.

Dated this 1st day of October, 2012.

/S Joseph P. Selbka

Joseph Selbka, Esq.

Hearing Officer

NOTICE OF APPEAL RIGHTS

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