

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Student],¹

Hearing Officer: Jim Mortenson

Petitioner,

v

[Local Education Agency],

Date Issued: October 24, 2013

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

A hearing officer determination (HOD) was issued in _____, by Independent Hearing Officer (IHO) Ryan on May 31, 2013, concerning the parties here. That HOD led to the complaint in this matter which was filed by the Petitioner on August 12, 2013. The May 31, 2013, HOD was not appealed. The Petitioner and Respondent are both represented by counsel.

A response to the complaint was filed by the Respondent on August 19, 2013, along with a motion to dismiss the complaint. The Petitioner filed a reply to the motion to dismiss on August 22, 2013. A resolution meeting was held on August 23, 2013, and resulted in no agreements. A prehearing conference was convened on August 26, 2013, and a prehearing order was issued on August 27, 2013. Included in the prehearing order was a denial of the Respondent's motion to dismiss.

The parties shared and filed disclosures and prehearing briefs on October 1, 2013. The hearing was convened at 9:00 a.m. on Tuesday, October 8, 2013, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing ended at 2:30 p.m. The due date for this Hearing Officer's Determination (HOD) is October 26, 2013. This HOD is issued on October 24, 2013.

The Respondent renewed its motion to dismiss at the hearing on October 8, 2013. The motion was again denied because the prior HOD did not specify everything that the new IEP was to require and it considered the 2012-2013 school year, not the current school year.

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. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

- (1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of her other educational needs that result from her disability, because the IEP proposed August 8, 2013, does not: a) provide the Student with sufficient specialized instruction in all academic areas; b) include goals and services for speech and language (communication) needs; and c) include sufficient behavioral support services?
- (2) Whether the Respondent failed to ensure the Petitioner was involved in the determination about the Student's educational placement when it unilaterally made a placement determination prior to the IEP team meeting on August 1, 2013, and whether that placement determination is the least restrictive environment (LRE) for the Student?

The Petitioner is seeking revisions to the IEP including: 27.5 hours per week of specialized instruction; one hour per week of speech and language services; one hour per week of behavior support services; and appropriate goals concerning speech needs, anxiety, and memory needs. The Petitioner is also seeking placement at the Attending School for the 2013-2014 school year.

The Respondent denied the Student a FAPE when the IEP, revised August 1, 2013, did not provide the Student with sufficient specialized instruction in all academic areas and include goals and services for speech and language needs. The Student no longer required behavioral support services. The Respondent also failed to ensure the Petitioner was involved in the determination about the Student's educational placement when it unilaterally made a placement determination prior to the IEP team meeting on August 1, 2013. Further, the placement unilaterally determined by the Respondent is not the LRE for the Student because the school cannot implement the IEP as written.

IV. EVIDENCE

Five witnesses testified at the hearing, four for the Petitioner and one for the Respondent. The Petitioner's witnesses were the Petitioner herself (P), The Petitioner's Mother (L.S.), the Educational Advocate (K.C.), and head of the Attending School (N.T.). The Respondent's witness was the Special Education Coordinator for Public School (Z.W.). P, L.S., and K.C. were the only witnesses to testify who were present at the IEP team meeting where the challenged IEP was discussed.

17 of the Petitioner's 43 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. 14 of the Respondent's 16 disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

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. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. 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, including the HOD of May 31, 2013², as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an 18 year old learner with a disability currently in the 10th grade at Attending School, a non-public special education day school in the District of Columbia.³
2. During the 2010-11 school year, Student attended 9th grade at her neighborhood high school. Student then enrolled and attended a D.C. public charter school ("District Charter") that had elected to have the Respondent act as its local educational agency ("LEA"). She attended District Charter for the 2011-12 school year, where she repeated the 9th grade.⁴
3. On Student's June 2011 report card, she failed English I, Algebra I, Spanish I, and Extended Literacy I. She also received a D+ in Biology and Cs in World History and Physical Education.⁵
4. On or about September 3, 2011, the Respondent's School Psychologist completed a

² Both parties offered the May 31, 2013, HOD into evidence, but the Undersigned had already informed the parties that it would be incorporated into the administrative record of the case as a matter of course as it had not been appealed.

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⁴ May 31, 2013, HOD, Finding of Fact (FF) 3.

⁵ May 31, 2013, HOD, FF 6.

written report of a Comprehensive Psychological Evaluation of Student. According to the report, teacher interviews conducted during the psychological evaluation indicated that Student had “difficulty with her processing,” a “little delay in picking up on new information,” and a “lot of difficulty keeping up with the work load.” Student reported that “her memory is not strong,” that “she easily forgets new learned information,” that “she is easily distracted and prefers working alone so she can concentrate on her assignments,” and that “she enjoys interacting with others.” The evaluator noted that Student was alert and put forth consistent effort during the testing procedure,” but “seemed to struggle during the memory portion of the cognitive testing.”⁶

5. On cognitive testing with the RIAS, Student earned a Composite Intelligence Index (or “CIX”) of 90, which fell within the range of average scores; her Verbal Intelligence Index (“VIX”) was measured at 81, which was below average for verbal intelligence skills; her Nonverbal Intelligence Index (“NIX”) was 104; and her Composite Memory Index (“CMI”) was 93. Behaviorally, the school reported that Student had “elevated difficulty with Hyperactivity, Anger Control, Negative Emotionality, and Executive Functioning.”⁷
6. In assessing the educational implications of these findings, the School Psychologist concluded that: Student “may have some difficulty staying in one place for a long period of time. For example, sitting in a class for more than 45 minutes may be challenging for [Student]. She may require frequent breaks as an accommodation.” The evaluator further noted Student’s “elevated levels of frustration in the school setting,” her “significant difficulty with organization,” and tendency to become distracted, which needed to be addressed educationally. In addition, based on the significant discrepancy between Student’s

⁶ May 31, 2013, HOD, FF 8.

⁷ May 31, 2013, HOD, FF 9.

verbal and nonverbal scores, the evaluator concluded that Student's "verbal skills are a deficit compared to her non-verbal thinking skills," suggesting difficulties in acquiring information through typical instructional approaches at the high school level.⁸

7. Overall, the 9/3/2011 Comprehensive Psychological Evaluation report recommended (inter alia) that the MDT obtain standardized academic scores to determine whether Student was learning disabled; that Student may benefit from counseling and scheduled breaks; and that "teachers may want to utilize project-based assignments that tap topics of interest for her." The evaluator did not reach any specific diagnoses or determinations of any disabilities.⁹
8. On or about January 31, 2012, Student was assessed to be performing on a 1st-4th grade level in math, and to have attained various reading skills to the 4th grade level, based on the Scantron Performance Test.¹⁰
9. On or about February 29, 2012, the Respondent convened a meeting of Student's MDT/IEP Team at District Charter, including the Parent. At this meeting, the MDT reviewed the Respondent's 9/3/2011 Comprehensive Psychological Evaluation report. Parent noted that she was seeing progress by Student at District Charter and liked the school. The Team discussed Student's difficulty expressing her thoughts and staying focused. Parent also provided consent for Respondent to conduct a speech/language evaluation of Student.¹¹
10. On or about March 29, 2012, Respondent completed a Speech and Language Evaluation of Student. Respondent's Speech/Language Pathologist conducted the evaluation to assess oral communication skills, determine current levels of achievement in that area and the impact, if any, on classroom performance. The evaluation found that Student "presents with

⁸ May 31, 2013, HOD, FF 10.

⁹ May 31, 2013, HOD, FF 11.

¹⁰ May 31, 2013, HOD, FF 13.

¹¹ May 31, 2013, HOD, FF 14.

communication scores that range from the average range to the mild deficit range.” Overall, the evaluator found that Student “presents with communication skills that are adequate for classroom communication,” concluding that “[w]hile [Student] demonstrates specific weaknesses, the gestalt of her communication profile is not indicative of a disabling communication disorder that would prevent her from accessing or gaining benefit from the general education curriculum.” She recommended that Student “would benefit from a customized set of strategies that should be incorporated in her overall educational plan to promote generalization of skills,” including techniques like (a) frequent exposure to vocabulary reinforcement routines, (b) accessing her prior knowledge through discussion, and (c) dictionary use using “think-alouds” and discussion of how to choose the most appropriate definition.¹²

11. On or about May 22, 2012, Respondent’s School Psychologist issued a revised report of Comprehensive Psychological Evaluation. The report stated that the dates of evaluation were 8/5/2011 to 5/21/2012. The evaluation now included additional background information, review of the recent speech/language evaluation, parent interview, and testing results from the Woodcock-Johnson Tests of Achievement – 3d Edition (“WJ- III”) and the Behavior Rating Inventory of Executive Function (“BRIEF”) – Parent/Teacher Reports. Parent reported that Student has a short attention span, easily forgets things, is easily distracted, cannot concentrate when other children are playing in the classroom, and has difficulty organizing homework items.¹³

12. The 5/22/2012 WJ-III testing revealed severe academic deficits. Results showed that Student’s “academic skills and ability to apply those skills are both within the very low

¹² May 31, 2013, HOD, FF 15.

¹³ May 31, 2013, HOD, FF 16.

range” when compared to others at her age level. In Broad Math, she received a standard score of 52 (Very Low) for an approximate grade equivalency (“GE”) of 2.8; in Broad Written Language, she scored 77 (Low) for a GE of 5.1; and in Broad Reading, she scored 82 (Low Average) for a GE of 6.1. She also scored Very Low in Math Calculation (SS=54; GE=3.2) and Applied Problems (SS=56; GE=1.8) subtests in the math area. Reading Fluency (90; 8.7) and Passage Comprehension (94; 8.9) were relative strengths.¹⁴

13. The 5/22/2012 BRIEF assessment of executive functioning (parent reporting) revealed that Student had a significantly elevated score on the Working Memory scale compared with like-aged peers. “This suggests that [Student] has substantial difficulty holding an appropriate amount of information in mind or in ‘active memory’ for further processing, encoding, and/or mental manipulation.” It also “suggests difficulties sustaining working memory, which has a negative impact on her ability to remain attentive and focused for appropriate lengths of time.” Children with limited working memory “often miss information that exceeds their working memory capacity such as instruction for an assignment.” Student’s score on the Plan/Organize scale was also significantly elevated, which suggests that she has “marked difficulty with the planning and organization of information which has a negative impact on her approach to problem solving.” Teacher reporting similarly indicated difficulties with aspects of executive function.¹⁵
14. With this additional information, Respondent’s School Psychologist concluded that Student qualified for special education services under the OHI classification due to her presenting ADHD (Primarily Inattentive Type) symptoms that adversely affected her educational performance. The evaluator recommended that the MDT meet to develop an IEP that

¹⁴ May 31, 2013, HOD, FF 17.

¹⁵ May 31, 2013, HOD, FF 18.

includes specialized instruction in reading, math, and written expression, counseling services, and social skills training. He also offered several educational recommendations designed to address Student's working memory and attention concerns.¹⁶

15. The next day, on or about May 23, 2012, the Respondent convened a meeting of Student's MDT/IEP Team at District Charter to discuss and determine eligibility. At this meeting, the Respondent determined that the Student was eligible for special education services as a student with an OHI, and issued a Prior Written Notice - Identification ("PWN") to that effect. Student's disability was found to impact her in all academic areas (Reading, Math, Written Expression), as well as communication and behavioral development.¹⁷
16. On or about June 1, 2012, the Respondent conducted a Functional Behavior Assessment ("FBA") of Student. According to the FBA, Student has problems with attention and attendance that interfere with her learning. "The student is rarely in school and due to this it's very hard for her to catch up with the rest of her class." When she is in class, she "is distracted easily mainly by her male classmates."¹⁸
17. On or about June 5, 2012, the Respondent convened another MDT meeting for the purpose of developing an initial IEP. Participants included a Special Education Teacher, General Education Teacher, District Charter's School Psychologist, Social Worker, Guidance Counselor, and Speech Pathologist. Parent and Student did not attend or participate. Parent had informed the Respondent that she was unable to attend the meeting because her advocate/representative was unavailable, but the Respondent went ahead with the meeting anyway.¹⁹

¹⁶ May 31, 2013, HOD, FF 19.

¹⁷ May 31, 2013, HOD, FF 20.

¹⁸ May 31, 2013, HOD, FF 21.

¹⁹ May 31, 2013, HOD, FF 22.

18. The Student's IEP developed June 5, 2012 provided 40 hours per month of Specialized Instruction in a General Education (inclusion) setting; four (4) hours per month of Behavioral Support Services in an Outside General Education setting; and four (4) hours per month of Speech/Language Pathology Services in an Outside General Education setting. The IEP included annual goals in Mathematics, Reading, and Written Expression; Communication/Speech and Language; and Emotional, Social and Behavioral Development. The IEP also included various classroom accommodations such as extended time for testing, repetition of directions, preferential seating, breaks, and use of calculators.²⁰
19. Student's grades during the 2011-12 school year included F's in English I, Algebra I, and Physical Science, and D's in World History and Spanish I.²¹
20. Student frequently missed school during the 2011-12 school year, which affected her grades. Most of her absences (approximately 47 of 62 total days) were excused for medical and other reasons. She was out of school for approximately six weeks in February-March 2013 due to child birth and related health issues.²²
21. In August 2012, L.S. enrolled Student in Attending School for the start of the 2012-13 school year, rather than returning her to District Charter. L.S. heard about the school through a relative, took a tour and spoke with the school owner/director, and thought the school would be a good fit for Student.²³
22. Attending School provides a full-time special education program for high school-level students with a variety of disabilities between the ages of 14 and 22. There are no non-disabled students. The school offers an 11-month program that includes academic instruction

²⁰ May 31, 2013, HOD, FF 23.

²¹ May 31, 2013, HOD, FF 26.

²² May 31, 2013, HOD, FF 27.

²³ May 31, 2013, HOD, FF 28.

the previous issue) a failure to provide an appropriate placement.²⁶ Relevant to the present complaint, the IHO in Case _____ determined that the IEP created for the Student on June 5, 2012, was not appropriate because, among other things, it lacked a BIP to address the Student’s attendance problem, lacked sufficient specialized instruction in mathematics, and, to address her organization and memory deficits, should have included the use of appropriate graphic organizers and goals and objectives relating to the “chunking” of information.²⁷ The IHO determined the Petitioner failed to show the Student required a full-time specialized instruction outside of the general education setting.²⁸ The HOD for Case No. 2013-0138 required, in relevant part:

[2](c) review and revise, as appropriate, the goals and services in Student’s individualized education program (“IEP”) dated June 5, 2012, in the areas of Reading, Writing, Written Expression; Communication/Speech and Language; Social, Emotional, and Behavioral Development; and Post-Secondary Transition Planning;

(d) discuss and determine whether Student’s appropriate exit category under her IEP should remain a High School Diploma or should be changed to a Certificate of Completion; and

(e) discuss and determine an appropriate public or non-public school/program in which to place the Student pursuant to the IDEA and D.C. Code § 38-2561.02 (b).

3. The IEP developed pursuant to paragraph 2 above shall provide specialized instruction in all academic areas within Student’s least restrictive environment, which shall include at least **five (5) hours per week** of specialized instruction in **Math** in an **Outside General Education** setting, either one-on-one or in small groups. The IEP shall also be revised to include classroom accommodations requiring use of appropriate **graphic organizers** and appropriate goals and objectives relating to the **“chunking” of information**.

4. Any school/program in which DCPS proposes to place Student pursuant to paragraph 2 above must (a) be able to implement Student’s revised IEP; (b) be appropriate for Student’s needs, including her need for a location with minimal distractions and her need for appropriate vocational training; and (c) be a school/program in which Student can access the general education curriculum and make adequate progress toward her IEP goals before exiting special education by Age 22.

²⁶ May 31, 2013, HOD.

²⁷ May 31, 2013, HOD, pp. 20 and 23.

²⁸ May 31, 2013, HOD, pp. 22, 24 and 27. (The placement in that case involved not the Public School in this case, but the District Charter, which is not involved in the present case. *See p. 27*, “The evidence was insufficient to show that District Charter could not have provided an appropriate program,”)

25. Following the prior HOD, four assessments of the Student occurred: a Speech & Language assessment, dated June 3, 2013; a Comprehensive Psychological Evaluation, dated June 17, 2013; a Functional Behavior Assessment, dated June 19, 2013; and a Level II Vocational Assessment, dated June 28, 2013.²⁹
26. The new Speech and Language assessment found the Student “demonstrated profoundly below average performance in the areas of receptive and expressive language, [and her] expressive and receptive vocabulary skills were moderately to significantly below average[.] Her articulation, fluency, oral motor and vocal skills [,however,] were within normal limits for her age and gender.” Thus, the Speech Pathologist recommended speech-language services, as well as the following strategies: repetition of oral directions or instructions; rephrasing of orally presented information; chunking/shortening information; frequent checks for understanding; and providing extended response time to allow for processing of information.³⁰
27. The new Comprehensive Psychological assessment consisted of, in addition to review of existing data: a Woodcock-Johnson III, Cognitive; a Woodcock-Johnson III, Achievement; Bender Visual Motor Gestalt Test, 2nd Ed.; Behavior Assessment Scale for Children, 2nd Ed. (BASC) -Self Report Scales – Adolescent; BASC – Parent Rating Scales – Adolescent; BASC – Teacher Rating Scales (x2); Teacher’s Questionnaire on Student’s Progress in the Classroom (x2); ADHDT (x3); Projective Technique: House; Tree; Person; Clinical Interview with Student; Interview with Parent; Classroom Observation.³¹ The Student’s Axis I diagnoses included Attention-Deficit/Hyperactivity Disorder, Predominately Inattentive Type (Previously Diagnosed), and Learning Disorder, NOS (Mathematics, Reading, and

²⁹ P 23, P 24, P 25, P 26.

³⁰ P 23.

³¹ P 24.

Written Expression). Recommendations included: continued placement in a separate, full time, therapeutic school for children with ADHD and a Learning Disability; a class with a low student-to-teacher ratio to allow more frequent interaction between Student and her teacher; praise of effort and eagerness to learn, and provision of encouragement and support; simple and brief instructions, sometimes given one step at a time or repeated by the Student; provision of outlines, lists of key concepts, and vocabulary lists prior to lesson presentations; reading with the Books on Tape in which she can read along to help with fluency and phonemic awareness; instruction on blending sounds, letter-sound associations, phoneme isolation, and labeling sounds and letters; word processing for completion of written assignments; instruction on distinguishing features of a sentence; use of manipulative in mathematics to help with subtraction, addition, regrouping, carrying over, multiplication, division, learning coin values, telling time, concepts of less than and greater than, and basic fractions; instruction on graphing out math problems to provide a visual aid in arriving at correct answers; and instruction on use of calculator to check math work. The Student's academic achievement was measured, as to Broad Reading, Broad Writing, and Broad Math, as grade equivalency of 4.4, 5.3, and 3.2, respectively.³²

28. The FBA noted the improvement in the Student's attendance and distractibility since being at the Attending School. It noted she was "benefiting significantly from the individual attention she receives in her self-contained classes[,] and that teachers "have no concerns regarding her behavior." The Student has seen increased attention, academic performance, and self-esteem resulting from the behavior she has been exhibiting, which includes: attending school regularly, focused and motivated to complete work, working independently; cooperative and asking questions. The antecedents to this behavior are the small class setting with

³² P 24.

individualized attention and a structured setting with clear directions, few distractions, and appropriate academic expectations. Thus, no additional or new behavior interventions or plans were recommended, other than continued specialized instruction in a full time special education school.³³

29. The IEP team convened on July 18, 2013, with the Student's teachers and others from the Attending School, some of the Respondent's staff, the Advocate and the Petitioner and her Mother.³⁴ One of Respondent's representatives, the Compliance Case Manager, refused let the meeting proceed because the Petitioner and her Mother were participating via telephone.³⁵ The IEP team met again on August 1, 2013, with the Petitioner, but none of her teachers were in attendance and only one administrator from the Attending School, as well as a group of Respondent's staff who had no direct knowledge of the Student were in attendance.³⁶

30. An IEP was brought to the new meeting and included, in relevant part: four math goals based on third and fourth grade standards; four reading goals based on ninth grade standards; and four writing goals based on ninth grade standards; five hours per week of specialized instruction in math, outside of the general education setting; four hours per week of specialized instruction in reading, outside of the general education setting; three hours per week of specialized instruction in written expression, outside of the general education setting; and 80 minutes per month of behavior support services on a consultative basis.³⁷

³³ P 25.

³⁴ R 7, T of K.C.

³⁵ R 7, T of K.C.

³⁶ T of K.C., P 34.

³⁷ P 31, P 34, T of K.C.

31. The IEP team determined that the Student’s disability classification should be changed from other health impairment to specific learning disability.³⁸ The Compliance Case Manager asserted that the meeting was an initial eligibility meeting, and did not know or believe that the Student had already been determined eligible for special education and related services.³⁹ Because the IEP was an initial IEP, according to the Compliance Case Manager, she believed it could not be a “full-time” IEP as was proposed by the Attending School staff.⁴⁰
32. The team reviewed the recent speech and language assessment and the Respondent’s Speech Pathologist discounted the findings, Student’s significant gap in academic achievement, and prior HOD, and reiterated the prior Speech and Language assessment, stating the Student did not have any speech and language needs and only required some compensatory strategies to address deficits in memory, vocabulary, comprehension, and retention.⁴¹
33. The Student’s academic performance was discussed and it was noted that the Student had attained various math skills from the first to fourth grade levels including: adding, subtracting, multiplying, and dividing whole positive numbers and fractions with like denominators.⁴² The Student’s poor comprehension skills were discussed and how that was impacting her in all classes where reading was required.⁴³ Her deficiencies in organizing structures, grammar, and vocabulary were also discussed.⁴⁴ The team discussed the FBA and the Student’s behavior needs, and the 80 minutes of consultative behavior support services were determined, without explanation.⁴⁵ There was no explanation for reducing the Student’s 27.5 hours per week of specialized instruction to 12 hours, but the Compliance Case Manager

³⁸ R 8, R 11.

³⁹ P 34.

⁴⁰ P 34, T of K.C.

⁴¹ P 33, R 8.

⁴² P 33.

⁴³ P 33.

⁴⁴ P 33.

⁴⁵ P 33, R 8, R 13.

believed that the HOD limited the Student to only five hours of specialized instruction in math, despite the urging of the LEA Representative at the meeting who said the Student's needs must be considered, not "the bare minimum outlined in the HOD[.]"⁴⁶

34. The Respondent requires placement determinations to be made by a "LRE team" and the IEP team is not permitted to make the placement decision.⁴⁷ So, at the team meeting, the Respondent advised that the Student's IEP would be implemented at the Public School because it was her neighborhood school and that it was "able to implement her IEP."⁴⁸ A letter informing the Petitioner of the location assignment was dated and provided to her that same day.⁴⁹ The Public School could not provide small group for reading or writing, only for math, and would provide the Student with a total of 13 hours of specialized instruction as opposed to the 12 hours proposed in the IEP.⁵⁰

35. A prior written notice was dated August 19, 2013, and lacks an explanation for the proposed actions noted, lacks any description of explanations for refused actions such as 27.5 hours of specialized instruction per week at the Attending School, and lacked a description of other options considered and other factors.⁵¹

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:

⁴⁶ P 33, R 8, R 13.

⁴⁷ T of Z.W., P 34.

⁴⁸ R 8.

⁴⁹ R 8, R 9.

⁵⁰ T of Z.W.

⁵¹ R 13.

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 a 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 HOD issued _____, by _____, considered several issues, only some of which are relevant here. It examined and made a determination about the IEP and placement of June 5, 2012. The IHO found that the IEP lacked a BIP to address the Student’s attendance issues which plagued her during the 2011-2012 school year, and sufficient specialized instruction in the area of math, thus denying her a FAPE. The IHO found that the Petitioner did not show that the Student required a “full-time, out of general education” program as part of the June 5, 2012, IEP, however. The Student was attending a District Charter School at the time and, the IHO found, the “evidence was insufficient to show that District Charter could not have provided an appropriate program, including some specialized instruction in an outside general education setting.” As compensatory relief the Respondent was required to pay for the remainder of the Student’s school year at the Attending School, through August 3, 2013.

An IEP team meeting was also ordered, with some specifics to include in the IEP, including:

specialized instruction in all academic areas within the Student’s least restrictive environment, which shall include at least **five (5) hours per week** of specialized instruction in **Math** in an **Outside General Education** setting, either one-to-one or in small groups. The IEP shall also be revised to include classroom accommodations requiring use of appropriate **graphic organizers** and appropriate goals and objectives relating to the **‘chunking’ of information**.

The order also required:

Any school/program in which DCPS proposes to place Student pursuant to paragraph 2 above must (a) be able to implement Student's revised IEP; (b) be appropriate for Student's needs, including her need for a location with minimal distractions and her need for appropriate vocational training; and (c) be a school/program in which the Student can access the general education curriculum and make adequate progress toward her IEP goals before exiting special education by Age 22.

While the authority to enforce an HOD rests directly with the State Education Agency (SEA), the HOD of May 31, 2013, left sufficient ambiguity for the IEP team to generate an IEP that included provisions not specifically addressed, and those that were specifically addressed, were not specific enough to dictate the exact provisions of the IEP (e.g. the IEP must include "at least" a certain amount of specialized instruction in math), leaving room for further challenge if the IEP team did not agree on the IEP. (See 34 C.F.R. § 300.152(c)(3) "A complaint alleging a public agency's failure to implement a due process hearing decision must be resolved by the SEA.") Further, while the HOD found that the Petitioner failed to show that in June 2012, the Student required a special school for educational placement, it specifically left the placement determination for the 2013-2014 school year open, with some parameters, which invited further litigation upon disagreement with the specifics. Thus, the present HOD does not purport to enforce the May 31, 2013, HOD, but to merely resolve the issues arising out of the attempt to develop a program and placement for the Student for the 2013-2014 school, and the requirements of the May 31, 2013, HOD are necessary to consider when examining the new programming and placement.

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

special education and related services that –

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

34 C.F.R. § 300.17. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA’s purpose. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. “[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” 71 Fed. Reg. 46662 (2006). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide these education benefits. Suggs v. District of Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “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, 679 F. Supp. 2d at 51-52. The IEP team must, for a “child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]” 34 C.F.R. § 300.324(a)(2)(i).

4. The analysis to apply in a case such as this is to first determine whether the agency “complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable

the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982) (footnotes omitted).

5. “[P]arents are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school.” N.S. ex rel. Stein v. Dist. of Columbia, 709 F. Supp. 2d 57, 72 (D.D.C. 2010) (citing Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009)). A student placed in a private school without the agreement of the school district is a gamble as reimbursement or payment for the private school may be provided “only if a court concludes that the placement approved by the school officials violates the IDEA and that the private school placement is proper under the IDEA.” Roark ex rel. Roark v. Dist. of Columbia, 460 F. Supp. 2d 32, 45. (D.D.C. 2006).
6. The significant reduction in the level of specialized instruction from 27.5 hours per week being provided to the proposed 12 hours per week was not appropriate to meet the Student’s academic deficits resulting from her disability. The IEP lacks any explanation for the 12 hours included - five hours per week for math, four hours per week for reading, and three hours per week for writing, all outside of the general education setting. The notes from the meeting, the IEP itself, the prior written notice, and the witness who were at the team meeting who testified did not provide any explanation for this when the Student was working on annual goals in math that were five and six years behind her current grade level (and she turned 18 last May, making her about three years behind her same aged peers in grade level), and ninth grade standards for reading and writing when her academic achievement was measured at the elementary school level, and the evaluation data and teachers recommended

a full day program. The only evidence in the record for the level of specialized instruction comes from meeting notes indicating the Respondent's Compliance Case Manager erroneously believed that the IEP was initial IEP, and also erroneously believed that because it was an initial IEP, the Student could not be provided with "full-time" specialized instruction as the teachers working with her had recommended. The Compliance Case Manager also erroneously believed the May 31, 2013, HOD required five hours of specialized instruction in mathematics, not a minimum of five hours, which drove the proposal, which was objected to but much of the IEP team, for only that amount. Additionally, the IEP lacked speech and language services despite evaluation data showing the Student required such services to address her receptive and expressive language needs. The Respondent's Speech and Language Pathologist at the team meeting discounted the recommended services from both the June 2013 speech and language assessment and the June 2013 comprehensive psychological assessment, concluding to the IEP team that the Student's speech and language deficits did not hinder the Student from accessing the classroom. This is not justified from the recent assessment results nor from the fact the Student was performing academically several years behind her grade level peers, and further behind her age-level peers. Fortunately, the Student did not experience any behavior problems in the Attending School, a special education day school, and therefore no behavior services were required, despite the findings in the prior HOD which examined her poor behavior at the District Charter. The 80 minutes per month of consultative behavioral support services were, like the other services in the IEP, unjustified. Her full day program obviated the need for additional behavioral support services.

7. Parents are to be “members of any group that makes decisions on the educational placement of their child.” 34 C.F.R. § 300.327, *See also* 34 C.F.R. § 300.116 & D.C. Mun. Regs. 5-E3013.1. In the District of Columbia this group is the IEP team. *See* D.C. Mun. Regs. 5-E3001.1.
8. The Respondent had developed the IEP prior to the IEP team meeting on August 1, 2013, and made no changes at the IEP team meeting, despite disagreements between team members, including among Respondent’s staff, about changes to the draft that should be made or further considered. The placement was, therefore, predetermined. Further evidence of this predetermination is the location assignment letter provided to the Petitioner at the meeting, dated August 1, stating the Student was assigned to the Public School. A location assignment cannot be made until after the placement determination is made. Furthermore, the evidence shows the Respondent has a policy or practice, in violation of both District of Columbia law and Federal law, of not permitting the IEP team to make the placement determination. An “LRE team,” not including the parent, handles questions of student placement for the Respondent. This predetermination and the practice of prohibiting the IEP team from making the placement determination violated the Petitioner’s due process right to be involved in the placement determination to be made by the IEP team, and is a case of extreme inequity.
9. The IDEA authorizes the Hearing Officer to fashion “appropriate” relief, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993); Reid v. District of Columbia, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Based on the evidence presented at the due process hearing, the findings and conclusions above, and relevant equitable considerations, the Hearing Officer concludes that the relief set forth in the Order

below is appropriate to address the violations and denials of FAPE found herein. While the Petitioner framed her request for relief as prospective placement, because she is already attending the requested non-public school, it is more accurately handled as a question of reimbursement, an equitable remedy supported by both Supreme Court interpretation of the IDEA and the statute itself. *See, Carter* 510 U.S. 7 (1993), 20 U.S.C. §1415(a)(10)(C). “IDEA authorizes reimbursement for the cost of private special education services when [1] a school district fails to provide a FAPE and [2] the private school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.” Forest Grove School District v. T.A., 557 U.S. 230, 129 S. Ct. 2484, 2496 (2009). *See also, Carter*, 510 U.S. 7, 12-13 (1993); School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 369-70 (1985). Where reimbursement relief is found to be authorized under the above two-part test, it must still be shown that such relief would be appropriate and equitable. *Carter*, 510 U.S. at 16; Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 129 S. Ct. 2484 (2009) (“When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted.”). Here, the Respondent’s failure to provide an appropriate IEP following a recent HOD, new assessment data in hand, ignoring the recommendations of the staff who worked with the Student, and predetermining the Student’s placement and denying her involvement in the decision-making process, when weighed against the educational progress and satisfaction the Student has made at the Attending School as well as her cooperation in attempting to develop an IEP, justify a

remedy of reimbursement for the cost of the non-public school. The fact that the Petitioner, or her parent, may not have incurred the expense of the Attending School is of no consequence. “The theme of concern for children from low-income families that runs through IDEA and its legislative history counsels caution in adopting an interpretation of § 1415(i)(2)(C)(iii) that would limit a private school tuition remedy to those who have the means to pay the tuition in the first instance.” Mr. and Mrs. A. ex rel. D.A. v. New York City, 769 F.Supp.2d 403, 412 (S.D.N.Y. 2011). A direct payment to the Attending School, if necessary, is just as appropriate as reimbursement of the costs of a wealthy parent whose child was denied a FAPE.

VII. DECISION

1. The Respondent denied the Student a FAPE when the IEP, revised August 1, 2013, did not provide the Student with sufficient specialized instruction in all academic areas and include goals and services for speech and language needs. The Student no longer required behavioral support services due to her educational environment.
2. The Respondent failed to ensure the Petitioner was involved in the determination about the Student’s educational placement when it unilaterally made a placement determination prior to the IEP team meeting on August 1, 2013. Further the placement unilaterally determined by the Respondent is not the LRE for the Student because the school cannot implement the IEP as written.

VIII. ORDER

The Petitioner will be reimbursed, or the Attending School paid directly by the Respondent, for the cost of the Student's 2013-2014 school year at the Attending School. If the Petitioner is to be reimbursed, she must provide proof of expenditures, such as cancelled checks or receipts, to the Respondent, through the current Compliance Case Manager involved in the Student's case, within 30 calendar days of this order. If the Attending School is to be paid directly because the Petitioner has not incurred any expenses for the Student's attendance thus far for the 2013-2014 school year the Petitioner is to provide the Attending School a copy of this Order within 30 calendar days of the date of the Order and the Attending School must then provide an invoice directly to the Respondent through the current Compliance Case Manager involved in the Student's case, or through whatever current mechanism is in place for payment for students placed at the Attending School by the Respondent, within 30 calendar days of the date of this Order.

IT IS SO ORDERED.

Date: October 24, 2013



Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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