

**District of Columbia
Office of the State Superintendent of Education**

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Student Hearing Office
April 4, 2014

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer: Charles M. Carron</p>
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HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed January 31, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of Columbia Public Schools (“DCPS”).

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

On February 4, 2014 the undersigned was appointed as the Impartial Hearing Officer.

On February 10, 2014, Respondent filed its timely Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on February 10, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on March 2, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on March 3, 2014 and will conclude on April 16, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on February 21, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by March 20, 2014 and that the Due Process Hearing (“DPH”) would be held on March 26 and 27, 2014. The PHC was summarized in the Prehearing Conference Summary and Order (the “PHO”) issued February 21, 2014, Hearing Officer Exhibit 8 (HO-8).

No motions were filed by either party and the DPH was held at the Student Hearing Office, 810 First Street, NE, Room 2006, Washington, DC 20002 on Thursday, March 27, 2014 from approximately 9:30 a.m. until approximately 4:45 p.m., and on Friday, March 28, 2014 from approximately 9:30 a.m. until approximately 3:25 p.m. Petitioner elected for the hearing to be closed.

At the DPH, the following documentary exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-45

Respondent’s Exhibits: R-1 through R-20

Hearing Officer’s Exhibits: HO-1 through HO-8

Respondent’s proposed Exhibit R-21, comprising two videos taken by Physical Therapist, was excluded because the videos, as disclosed, could not be opened on either Petitioner’s counsel’s computer or the Hearing Officer’s computer.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) the Student;
- (b) Petitioner;
- (c) Paralegal;
- (d) Senior Educational Advocate, who was admitted, without objection, as an expert in the interpretation of educational evaluation results and the development of educational programming of special education students;
- (e) Owner – Private Summer Program; and
- (f) Clinical Coordinator - Non-Public School.

The following witnesses testified on behalf of Respondent at the DPH:

- (a) Physical Therapist, who was admitted, without objection, as an expert in physical therapy;
- (b) Occupational Therapist, who was admitted, without objection, as an expert in occupational therapy;
- (c) Special Education Teacher #1;
- (d) Special Education Teacher #2; and
- (e) Special Education Teacher #5.

The parties gave oral closing arguments and did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of

the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the DPC are as follows:

The Student is female, Current Age, and attends Current Grade at Public School C. The Student has been determined to be eligible for special education and related services as a child with a disability, Intellectual Disability (“ID”) under the IDEA.

Petitioner claims that Respondent has denied Student a FAPE since January 2013 by providing her inappropriate placements and locations of service, and not providing all of the specialized education and related services she requires.

IV. ISSUES

As confirmed at the PHC, in the PHO, and as modified by stipulation of counsel on the record at the DPH, the following issues were presented for determination at the DPH:

(a) From January 2013 through February 11, 2013, did Respondent deny the Student a FAPE by failing to implement her March 13, 2012 Individualized Education Program (“IEP”) while she attended Public School A?

(b) From January 2013 through February 11, 2013, did Respondent deny the Student a FAPE by requiring her to attend Public School A prior to developing a new Individualized Education Program (“IEP”) for her and determining her placement and location of services (“LOS”)?

(c) On or about February 11, 2013, did Respondent deny the Student a FAPE because the goals in the IEP developed for her were based upon DCPS

assessment standards² that were inappropriate for the Student, who required functional and daily living skills goals based upon the nature and severity of her disability, and because the IEP did not specify that the Student needed a functional academic and daily living skills program?

(d) From February 12, 2013 through mid-March 2013, did Respondent deny the Student a FAPE by failing to implement her February 11, 2013 IEP while she attended Public School A?

(e) On or about June 20, 2013, did Respondent deny the Student a FAPE by assigning her to attend Public School C for School Year (“SY”) 2013-2014 because Public School C does not have a program for students with ID that can provide the functional and daily living skills instruction the Student needs?

(f) On or about January 15, 2014, did Respondent deny the Student a FAPE because the goals in the IEP developed for her are based upon DCPS assessment standards that are inappropriate for the Student, who requires functional and daily living skills goals based upon the nature and severity of her disability, and because the IEP does not specify that the Student needs a functional academic and daily living skills program?

(g) On or about January 15, 2014, did Respondent deny the Student a FAPE by discontinuing Physical Therapy (“PT”) services without conducting new

² In the DPC, at the PHC and in the PHO, these standards were referred to as DCPS Common Core State Standards (“CCSS”). At the DPH, counsel for the parties both noted that the Student is subject to the “DC CAS-Alternative Assessment.” The distinction is not material to determination of the issues in this matter. Accordingly, the undersigned has substituted the phrase “DCPS assessment standards” in this HOD.

clinical testing of the Student and prior to obtaining input from Petitioner or other members of the IEP Team?

(h) On or about January 15, 2014, did Respondent deny the Student a FAPE by revising Occupational Therapy (“OT”) from direct services to consultation without conducting new clinical testing of the Student and prior to obtaining input from Petitioner or other members of the IEP Team?

(i) Since January 15, 2014, has Respondent denied the Student a FAPE by failing or refusing to conduct assessments or fund independent assessments of the Student’s need for PT despite Petitioner’s request for such assessments?

V. RELIEF REQUESTED

Petitioner requests the following relief:

- (a) findings in favor of Petitioner on all issues;
- (b) an Order that Respondent fund the Student’s attendance with transportation at the Non-Public School, effective ten days after issuance of the HOD;
- (c) an Order that Respondent fund, within ten days after issuance of the HOD, independent OT and PT evaluations to determine whether the Student continues to require OT and/or PT services;
- (d) an Order that Respondent convene the Student’s IEP Team within 15 days of receiving the later of the OT and PT evaluations to review those evaluations, make any appropriate changes to the Student’s IEP including updating present levels of performance, revising goals, updating or revising needs

statements and/or impact statements related to PT and OT, and determining whether the Student requires OT and/or PT services and if so the appropriate hours of those services; and

(e) an Order that Respondent provide compensatory education in the form of funding and transportation to and from Private Summer Program and placement at Non-Public School.

VI. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a female of Current Age. P-8-1,³ P-20-2.
2. The Student resides in the District of Columbia. *Id.*
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with ID. *Id.*, stipulation of counsel at the DPH.

The Student's School Attendance During SY 2011-2012

4. During SY 2011-2012, the Student attended a self-contained ID classroom at Public School B. Testimony of Petitioner.
5. The Student's IEP dated February 13, 2012, while she attended Public School B, provided that she should receive 25 hours per week of specialized instruction, 120 minutes per month of physical education, 120 minutes per month of OT, four hours per month of Speech-Language Pathology, and 120 minutes per month of PT and that all

³ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

of this instruction and all of these services should be provided in the outside of general education setting. P-3-1 and -9.

6. On June 3, 2012, apparently before the end of SY 2011-2012, Petitioner moved to State X with her family, including the Student. Testimony of Petitioner.

The Student's Education During the First Half of SY 2012-2013

7. There is no evidence in the record about the Student's education in State X during the summer of 2012 or the first half of SY 2012-2013.

8. Petitioner's representatives do not have any information regarding the Student's education in State X during the summer of 2012 or the first half of SY 2012-2013, and therefore did not share any such information with Respondent. Testimony of Paralegal.

9. The undersigned finds that it is impossible to determine what regression in skills, and the extent of such regression, the Student suffered in State X during the summer of 2012 or the first half of SY 2012-2013.⁴

10. Petitioner and her family, including the Student, returned to the District of Columbia in late December 2012. Testimony of Petitioner.

⁴ Accordingly, the testimony of Senior Educational Advocate that the Student's achievement test scores in 2009 and 2013 demonstrate minimal progress cannot establish whether her failure to progress was due to Respondent's denial of FAPE, the six-month gap in the Student's DCPS education when she lived in State X, the limits of her cognitive abilities, or other factors.

The Student's Attendance at Public School A During January through March 2013

11. On January 1, 2013, Petitioner left one or more voice mail messages for Respondent regarding re-enrolling the Student in the self-contained ID program at Public School B. *Id.*

12. On January 4, 2013, Petitioner called the Principal of Public School B, who told her to enroll the Student at her "local" school, which was Public School D. *Id.*

13. Public School D told Petitioner to enroll the Student at Public School A. *Id.*

14. Petitioner enrolled the Student at Public School A and the Student began attending School A sometime after January 4, 2013. *Id.*

15. Until February 11, 2013, Respondent did not implement the Student's February 13, 2012 IEP (or any IEP); rather, the Student sat in the general education classroom all day doing no work. Testimony of Paralegal.

16. Based upon the entire record, the undersigned finds that Respondent's failure to implement an IEP for the Student from January 4 through February 11, 2013 was material.

The Student's January 30, 2013 Observation and February 7-11, 2013 Reevaluation

17. On January 30, 2013, Respondent conducted an observation of the Student at Public School A. P-6.

18. The observer recommended that the Student continue with a full time outside of general education program "as indicated on her current IEP." P-6-5.

19. On February 7, 2013, Respondent completed a written reevaluation of the Student. P-4-1.

20. On February 11, 2013, Special Education Teacher #3 administered the Woodcock Johnson (“WJ-III”) Tests of Achievement to the Student, concluding that her academic skills and overall ability to apply those skills were “negligible” and the fluency with which she performed academic tasks was “limited.” P-40-1 and -2.

The February 11, 2013 IEP Team Meeting

21. An IEP Team meeting was held on February 11, 2013, at which the Team determined that the Student remained eligible as a student with ID, that her goals remained the same and she continued to require a “full time” outside of special education program. P-5-3.

22. The Student’s February 11, 2013 IEP required the same specialized instruction and the same related services, in the same outside of general education setting, as the Student’s February 13, 2012 IEP. P-8-11 and P-3-9.

23. On February 11, 2013, Respondent issued a Prior Written Notice (“PWN”) stating that the IEP Team had determined that the Student continued to need special education services as a student with ID. P-5-1.

24. The PWN also stated that the Student would continue to receive services at Public School A “pending a placement.” *Id.*

25. The undersigned finds that both parties used the term “placement” to mean LOS, inasmuch as the Student’s placement—a full time outside general education program with specified related services—already had been determined.

26. Based upon the entire record, in particular Respondent’s reevaluation and the IEP Team confirming that the Student had the same needs and required the same

placement in February 2013 that she had in SY 2011-2012,⁵ the undersigned finds that Respondent knew or should have known that Public School B remained an appropriate LOS for the Student.

Partial Implementation of the Student's February 11, 2013 IEP at Public School A

27. From February 11 until sometime in April 2013, the Student received some specialized instruction at Public School A, but "not a lot." Testimony of Paralegal.

28. Based upon the entire record, the undersigned finds that assigning the Student to attend Public School A subsequent to February 11, 2013, was not an appropriate placement or LOS for the Student because that school could not implement her IEP.

Assignment of the Student to Attend Public School B

29. On or about March 15, 2013, Special Education Teacher #3 informed Petitioner that Respondent was offering to have the Student attend the ID program at Public School B and that she could contact the Special Education Coordinator ("SEC") there to arrange an observation. P-2-3.

30. On March 15, 2013, Paralegal emailed Special Education Teacher #3 questioning the assignment of the Student to Public School B without Petitioner having requested it, without an IEP Team meeting, and without a PWN. *Id.*

31. On March 18, 2013, Special Education Teacher #3 replied to Paralegal, stating that the SEC was available for a telephone conference the next day. P-2-4.

32. Paralegal requested additional dates. P-2-6.

⁵ In fact, Respondent considered the Student's February 13, 2012 IEP to be the Student's "current" IEP as of February 7, 2013. P-4-1.

33. Special Education Teacher #3 responded that she had spoken with Petitioner who was available on March 19, 2013. P-2-8.

34. Paralegal replied that Petitioner was not available on March 19, 2013, and also asserting that a conference call was not the appropriate means to offer “placement” of the Student at Public School B; Paralegal requested a full IEP Team meeting with the SEC participating by telephone. P-2-10.

35. On March 19, 2013, Special Education Teacher #3 replied to Paralegal, asking her to propose three dates for the IEP Team meeting. P-2-12.

36. Paralegal replied offering three dates. P-2-13.

37. On March 20, 2013, Special Education Teacher #3 replied to Paralegal, confirming one of the three dates offered by Paralegal, *i.e.*, March 25, 2013. P-2-18.

The March 25, 2013 IEP Team/Multidisciplinary Team (“MDT”) Meeting

38. At the March 25, 2013 IEP Team meeting, Respondent stated that Petitioner had not been permitted to reenroll the Student at Public School B, instead requiring her to attend Public School A, “due to out of boundary requirements.” P-10-9, testimony of Senior Educational Advocate.

39. All of the participants at the March 25, 2013 IEP Team meeting agreed that Public School A was “doing the best it could” but was not appropriate for the Student and she was not receiving all of the support she needed there. Testimony of Paralegal, testimony of Senior Educational Advocate.

40. The Student's disability classification and IEP goals were to remain the same.⁶ Testimony of Senior Educational Advocate; P-10-9.

41. According to the PWN issued by Respondent at the meeting, the Student required a "full-time ID program to address her needs." P-11-1.

42. According to notes taken by Senior Educational Advocate, the Student's MDT⁷ determined that she should attend Public School B as soon as transportation was arranged.⁸ P-10-1; *accord*, Respondent's notes (P-10-10) and PWN (P-11-1).

⁶ The Student's March 27, 2013 Amended IEP included academic goals in Mathematics, Reading and Written Expression. P-14-2 through -5. The Student's academic goals included references to DCPS assessment standards, *e.g.*, "3.NSO-C.10. Demonstrate an understanding of and the ability to use conventional algorithms for the addition and subtraction of up to five-digit whole numbers." *Id.* The Student's academic goals included statements specific to her, *e.g.*, "[The Student] will be able to add and subtract single- and double-digit numbers without regrouping." *Id.* The March 27, 2013 IEP does not specify training in activities of daily living. In any event, Petitioner has not challenged the March 27, 2013 IEP. HO-8-2 and -3. Accordingly, it is not necessary for the undersigned to make a finding on the appropriateness of the March 27, 2013 IEP to determine the issues in the instant case.

⁷ The parties often use the terms "IEP Team" and "MDT" interchangeably. The distinction is not material to the determination of the issues in the instant case.

⁸ On March 27, 2013, Special Education Teacher #3 emailed Paralegal confirming that the Student's transportation to (and, apparently attendance at) Public School B would begin (Friday) March 29, 2013. P-2-21. Special Education Teacher #3 also advised Paralegal that Petitioner needed to register the Student at Public School B. *Id.* The Student's revised IEP and a PWN were attached to the email. *Id.* Thus, Respondent was willing to have the Student attend Public School B as of March 15, 2013 (P-2-3), and the delay until March 29, 2013 was due to Petitioner's insistence upon an IEP Team Meeting, and Petitioner's unavailability for such a meeting between March 19 and 25, 2013 (P-2-24). The parties had additional correspondence between March 27 and 30, 2013 reflecting their disagreement as to whether Petitioner had to register the Student at Public School B. P-2-24 through -27. As a result of this disagreement, apparently the Student did not begin attending Public School B until a later date. However, Petitioner has not alleged any denial of FAPE occurring between mid-March and June 20, 2013. HO-8-2 and -3. Accordingly the disagreement over registration is irrelevant to resolution of the issues in the instant case.

43. According to notes taken by Senior Educational Advocate and notes taken by Paralegal, the Student's MDT determined that she had "lost skills" and would be referred for Extended School Year ("ESY") services. P-10-2 and 5.

44. There was no discussion of ESY as constituting compensatory education.
Testimony of Paralegal.

45. Special Education Teacher #4 stated that the Student had experienced regression in reading and that she was not receiving the support she needed because of the general education setting. *Id.*

46. According to Respondent's notes, there was no finding that the Student had experienced regression of critical skills, and there were no data to support ESY; however, the Student's IEP would be revised to provide for ESY "due to the break in service." P-10-10; *accord*, IEP Amendment Form, P-11-3.

47. The Student's March 27, 2013 Amended IEP added ESY services, specifically four hours per day of specialized instruction and one hour per week of Speech-Language Pathology, all in the outside of general education setting, from July 8 through August 2, 2013. P-14-15.

48. Contrary to Respondent's notes of the March 25, 2013 IEP Team meeting and the associated IEP Amendment Form, Respondent's ESY Services Eligibility Worksheet states that the Student had shown regression in all areas.⁹ P-12-1.

49. Respondent's notes indicate that "compensatory education for missed hours" would be determined at a later date after data were collected "to determine the harmful

⁹ That form also stated that the amount of time required for recoupment of critical skills could not be determined. P-12-1.

effects for [the Student] missing some academic hours during the process of changing the placement.” P-10-10.

50. Special Education Teacher #4 stated that she needed to collect data to justify compensatory education. Testimony of Paralegal.

51. The Student had qualified for ESY every year that she attended DCPS. *Id.*, testimony of Petitioner.

52. Based upon the entire record, the undersigned finds that the Student’s IEP Team did not consider ESY to be compensatory education for the failure to implement the Student’s IEP at Public School A, and that Respondent acknowledged the potential need to provide such compensatory education once the Student’s educational deficits flowing from the failure to implement her IEP were known.

53. There is no evidence in the record as to what services specified in the Student’s IEP were provided or what educational deficits the Student experienced as a result of the failure to implement her IEP fully from February 11 to mid-March 2013.¹⁰

The Student’s LOS Assignment for SY 2013-2014

54. On or about April 18, 2013, Public School B informed Petitioner that she should enroll the Student at a school for SY 2013-2014. P-2-28.

55. Petitioner’s counsel emailed the Dean of Students/LEA [Local Educational Agency] Representative at Public School B (“LEA Rep.”) on April 18, 2013, and again

¹⁰ By requesting the issuance of Notices to Appear, as discussed at the PHC and stated in the PHO (HO-8-13), Petitioner could have compelled the attendance and testimony of the Student’s teachers and/or staff of Public School A, to elicit testimony as to the hours of specialized instruction that were provided and the Student’s educational deficits resulting from the services that were not provided. Petitioner’s failure to procure such testimony has limited the relief available to her.

on April 25, 2013, asserting that the appropriate procedure was to convene a “placement” meeting. P-2-28 and -29.

56. The morning of April 26, 2013, Senior Educational Advocate emailed LEA Rep. requesting a “30 day review” meeting for the Student to discuss her “placement” for SY 2013-2014. P-2-35.

57. The afternoon of April 26, 2013, Respondent’s counsel replied to Petitioner’s counsel’s April 18 and 25, 2013 emails (but not Senior Educational Advocate’s email of the morning of April 26, 2013, of which he apparently was unaware), stating, *inter alia*, that Respondent was unaware of anyone asking Petitioner to enroll the Student at a school for SY 2013-2014 and that her LOS was Public School B. P-2-33. Respondent’s counsel apparently misunderstood that the Student was “aging out” of Public School B and needed a different LOS for SY 2013-2014.

58. On May 9, 2013, and again on May 14, 2013, Senior Educational Advocate emailed LEA Rep. and another representative of Respondent requesting a “30 day review ... and a placement meeting” for the Student. P-2-36 and -37.

59. On May 14, 2013, LEA Rep. replied to Senior Educational Advocate stating that Respondent would schedule a meeting by the end of that week. P-2-38.

60. On May 16, 2013, Senior Educational Advocate emailed LEA Rep. stating, *inter alia*, that Petitioner had been advised to enroll the Student at Public School C, which was not the appropriate procedure, that Petitioner was awaiting an invitation with three dates and times for a “30 day review/placement meeting,” and that the invitation should be made through Petitioner’s counsel’s office. P-2-40.

61. On May 17, 2013, Paralegal emailed LEA Rep. and another representative of Respondent instructing them to communicate with Petitioner's counsel, rather than directly with Petitioner, regarding the scheduling of IEP Team meetings.¹¹ P-2-41.

62. On May 20, 2013, Petitioner's counsel emailed LEA Rep. and another representative of Respondent stating, *inter alia*, that Petitioner had just received an invitation to a meeting to be held either May 21 or 23, 2013. P-2-43. Petitioner's counsel asserted that the letter of invitation should be sent to her (Petitioner's counsel) and Senior Educational Advocate, rather than Petitioner, pursuant to Petitioner's instructions. *Id.* Petitioner's counsel requested dates for the meeting that were not within the next two days so that Petitioner's counsel and Senior Educational Advocate would be able to attend. *Id.*

63. On June 14, 2013, Senior Educational Advocate emailed Special Education Teacher #5 relating Petitioner's summary of a telephone conversation with Special Education Teacher #5 concerning scheduling of a meeting. P-2-46. Apparently no mutually agreeable date had yet been identified. *Id.* Senior Educational Advocate expressed her disbelief that Respondent had a policy of scheduling meetings directly with parents rather than through their attorneys or educational advocates. *Id.*

¹¹ There is no provision of IDEA or its implementing regulations that precludes a Local Educational Agency ("LEA"), such as Respondent, from communicating directly with a child's parent, whether or not the parent prefers to have the LEA communicate with her counsel; accordingly, Petitioner is responsible for any delays caused by the insistence of Petitioner or her representatives that Respondent communicate only through Petitioner's representatives.

64. On June 19, 2013, Senior Educational Advocate emailed LEA Rep. and another representative of Respondent confirming an MDT meeting for the Student the next day. P-2-47.

65. Notes of the June 20, 2013 IEP Team/MDT meeting taken by Senior Educational Advocate indicate that Respondent's representatives proposed Public School C as the Student's LOS for SY 2013-2014, stating that Public School C had a "self-contained ID classroom" with a "functional component & an academic component." P-16-1; *accord*, testimony of Paralegal and notes taken by Paralegal (P-16-5).

66. The "functional" aspect was described as two days per week, comprising travel training, laundry, and cooking, at the discretion of the teacher, "run however the teacher wants to run it." Testimony of Paralegal; *accord*, testimony of Senior Educational Advocate and P-16-2, -5 and -6.

67. According to the notes taken by Paralegal, Petitioner stated that the Student needed daily living skills training every day, to which Respondent replied that whatever needs the Student had would be accommodated. P-16-6.

68. Petitioner "still had concerns," but based upon the description of the daily living skills instruction, the Parent "decided to give it a try."¹² Testimony of Paralegal.

¹² Petitioner, Paralegal and Senior Educational Advocate testified that Respondent's representatives, particularly the Assistant Principal of Public School C, stated that Public School C had a self-contained classroom specific to students with ID, and that they did not learn until after the PHC in the instant case that the Student was in a classroom with peers all of whom have a disability classification of autism. Accordingly, the undersigned does not infer any waiver from Petitioner's willingness to give Public School C a try. That is the only relevance of the late-disclosed fact that the Student has not been attending a "self-contained ID classroom." Resolution of the issue regarding the appropriateness of Public School C does not turn on whether Petitioner was misled, or on whether the Student's classroom was limited to children with ID, but rather on whether Public School C can implement her IEP, as discussed in detail *infra*.

69. On June 20, 2013, Respondent issued to Petitioner a “notice of location assignment,” informing Petitioner that the Student’s LOS for SY 2013-2014 would be Public School C. P-15-1.

70. Based upon the entire record, the undersigned finds that any confusion regarding how the Student’s LOS for SY 2013-2014 would be determined, and any delays associated with that determination, had no impact upon the Student because the determination was made two months prior to the beginning of SY 2013-2014.

71. Although the parties referred to the June 20, 2013 meeting as a “placement” meeting, there was no discussion of the Student’s IEP goals or specialized education or related services; accordingly, the meeting was for purposes of determining the Student’s LOS, not to change her placement. Testimony of Paralegal.

72. On June 21, 2013, Senior Educational Advocate wrote to LEA Rep. stating disagreement with Respondent not allowing her to speak at the June 20, 2013 meeting, and also stating Petitioner’s and her representatives’ disagreement with the “change in placement” (by which Petitioner’s counsel apparently meant the decision that Public School C would be the Student’s LOS for SY 2013-2014). P-17-1.

The Student’s Program at Public School C

73. The Student attends a self-contained special education classroom at Public School C with six other children, all of whom have a primary disability classification of autism. Testimony of Special Education Teacher #2.

74. The Student and her classmates spend part of the day learning Mathematics, Science and life skills from Special Education Teacher #2, and part of the day learning

Reading, Written Expression and other life skills from Special Education Teacher #1.

Testimony of Special Education Teacher #1, testimony of Special Education Teacher #2.

75. The life skills that Special Education Teacher #1 teaches the Student comprise filling out cards with the Student's name, birthday, address, etc.; completing job applications with the same information; addressing envelopes, *e.g.* to utility companies; handwriting skills; and reading city maps and role-playing such as, "if you needed to cash a check where would you go?" to have the Student identify the bank on the map.

Testimony of Special Education Teacher #1.

76. The life skills that Special Education Teacher #2 teaches the Student comprise primarily counting money and telling time, on average once a week for about an hour.

Testimony of Special Education Teacher #2.

77. Special Education Teacher #2 utilizes multiple modalities to teach money skills, *i.e.*, real and fake money and worksheets. *Id.*

78. Special Education Teacher #2 integrates life skills training into the academic curriculum (*e.g.*, using thermometers and measuring).

79. Each teacher has a dedicated educational aide and the Student is escorted by a teacher or aide at all times. *Id.*, testimony of Special Education Teacher #1.

80. Based upon the entire record, the undersigned finds that Public School C was able to implement the Student's February 11, 2013 IEP as well as the Student's IEP developed on January 15, 2014 discussed *infra*.

The October 2, 2013 IEP Team/MDT Meeting

81. Between August 26, 2013 and October 1, 2013, Paralegal and Special Education Coordinator (“SEC”) exchanged numerous emails about scheduling a “30 day review” meeting for the Student at Public School C, and whether Respondent’s attorney would attend. P-2-49 through -59.

82. A meeting of the Student’s IEP Team was held on October 2, 2013. P-2-60, P-18-1 and -6.

83. The Team discussed the Student’s present levels of performance. P-18-1, -2, -6 and -7.

84. The Student’s teachers stated that they were pleased with her progress.
Testimony of Paralegal.

85. Petitioner stated that she wanted the Student to receive more life skills training than she was receiving. Testimony of Special Education Teacher #2.

86. According to Respondent’s notes, the life skills that Petitioner mentioned were “time telling and safety skills (recognition).” P-18-2. According to notes taken by Senior Educational Advocate, the life skills that Petitioner mentioned were “sorting & cooking etc.” and Petitioner asked that these skills be taught daily. P-18-4.

87. According to Paralegal’s notes, Respondent stated that life skills were taught four out of five days, one hour per day. P-18-6.

88. According to notes taken by Senior Educational Advocate, Petitioner raised concerns about the Student regressing in PT, specifically walking and jumping, and that Respondent stated that progress reports would be provided. P-18-5, -8.

Correspondence Regarding the October 2, 2013 IEP Team/MDT Meeting

89. On October 9, 2013, Senior Educational Advocate wrote to SEC, complaining, *inter alia*, that the Student's related-service providers were not in attendance at the October 2, 2013 meeting. P-19-1.

90. Senior Educational Advocate's letter also expressed concern that there was no life skills "curriculum with a scope and sequence." *Id.*

The Student's Academic Performance During SY 2013-2014 to Date

91. The Student made substantial progress in Mathematics from the beginning of SY 2013-2014 to November 25, 2013, based upon testing using the Brigance Inventory. Testimony of Special Education Teacher #2; P-21-10, P-25-1, R-3-2.

92. At the beginning of SY 2013-2014, the Student was not able to add and subtract consistently, performed patterns only about half the time, and could work only 10 to 15 minutes independently. Testimony of Special Education Teacher #2.

93. By March 2014, the Student's Mathematics skills had improved significantly; she knows her 2's, 3's and 5's, can perform patterns more consistently, has greater stamina to work longer independently, and she adds and subtracts more consistently and with fewer mistakes, including double and triple digit numbers, as long as she is not required to regroup numbers. *Id.*

94. In the classroom, the Student can count by 3's correctly, but if she does not do so frequently, she forgets; accordingly, Special Education Teacher reinforces that lesson. *Id.*

95. At the beginning of SY 2013-2014, the Student had difficulty in Science with observations and measurements, and she could not use a thermometer or stopwatch. *Id.*

96. By March 2014, the Student is able to determine temperature by reading thermometers in Fahrenheit and Celsius, can use a timer when reminded about minutes and seconds, and can measure in inches or to the nearest centimeter. *Id.*

97. During SY 2013-2014 to the end of March 2014, the Student learned to measure objects and compute perimeters. *Id.*

98. Petitioner testified that the Student had difficulty with Mathematics homework that involved fractions, measuring perimeters, and multiplying some numbers (*e.g.*, counting by 3's), and does not understand graphs. Testimony of Petitioner.

99. The Student made substantial progress in Reading from the beginning of SY 2013-2014 to December 18, 2013, based upon testing utilizing the Brigance Inventory of Basic Skills II (Reading) and the Edmark Reading Program. Testimony of Special Education Teacher #1, P-20-6, R-3-3.

100. At the beginning of SY 2013-2014, the Student's reading was well below grade level, and she required a lot of verbal prompting to decode material. Testimony of Special Education Teacher #1.

101. As of March 2014, the Student had improved; she recognizes more sight words, is working on comparing and contrasting, and she can analyze information from text and provide clear responses. *Id.*

102. The Student now is able to read higher level texts and provide better answers to comprehension questions. *Id.*

103. At the beginning of SY 2013-2014 the Student had only a basic understanding of sentences and could write only two or three word sentences, with inconsistent punctuation and capitalization, and not on topic. *Id.*

104. As of March 2014, the Student's writing has improved since the beginning of SY 2013-2014; her handwriting is more legible and she can compose six or seven word sentences that are coherent and have consistent punctuation and capitalization. *Id.*

105. The Student does not retain information well; she requires substantial repetition (*i.e.*, "maintenance"). *Id.*

106. Petitioner agrees that the Student has made progress in written expression.
Testimony of Petitioner.

107. The Student's report card for the first half of SY 2013-2014 (term 2) shows that she earned As and Bs in all academic subjects. P-26-1 and -2.

108. According to the Student's IEP Progress Report for the period August 26 through November 1, 2013, she had mastered four of her IEP goals and was progressing on the remaining goals (except one that had just been introduced and one that had not yet been introduced). R-7.

109. Petitioner introduced into evidence numerous exhibits of the Student's school work during SY 2013-2014 that contain obvious errors (P-27), to demonstrate that the Student is not performing grade-level work and therefore cannot be earning As and Bs.

110. Respondent introduced into evidence numerous exhibits of the Student's academic achievement based upon DCPS assessment standards, including assessments

performed as late as March 5, 2014 (R-4) and Edmark Reading Program results from testing between February 6 and 10, 2014 (R-5).

111. Because the Student's academic progress is appropriately measured primarily by her achievement of her own IEP goals, the undersigned finds the report card (P-26), the work samples (P-27) and the DCPS assessment standards (R-4) to be of minimal significance in determining whether her IEPs were reasonably calculated to confer educational benefit.

112. On November 22, 2013, Senior Educational Advocate emailed SEC stating, *inter alia*, that Petitioner thought the Student's grades did not reflect her lack of academic progress and possible regression in skills in SY 2013-2014, and that Petitioner was "also concerned about the escalation in behaviors which appear to have been picked up at school." P-2-61. Senior Educational Advocate requested a meeting to discuss these concerns. *Id.*

The Student's Progress in PT During SY 2013-2014 to Date

113. As of January 3, 2014, the Student still needed external support to "step up onto a rocker balance board as well as maintain her balance." P-24-1.

114. According to Physical Therapist's records ("Service Trackers"), as of January 9, 2014, the Student had mastered the PT goals in her IEP. R-11-1.

115. According to Physical Therapist's Physical Therapy Progress Report dated January 15, 2014, which she presented at the January 15, 2014 IEP Team meeting discussed *infra* (Testimony of Physical Therapist), the Student had mastered 10 of her 12 PT goals (P-23-1 and -2). The fact that she needed "support" for the remaining goals

(P-23-2, P-24-1) meant that she needed external support, such as holding a railing, which was acceptable and did not require additional therapy (Testimony of Physical Therapist).

116. Special Education Teacher #2 has observed the Student climbing stairs, using alternating feet, without difficulty. Testimony of Special Education Teacher #2.

117. As of January 2014, the Student's gross motor skills were adequate for her to access all areas of the school independently, including opening doors, climbing stairs and traveling the hallways. Testimony of Physical Therapist.

118. The Student could climb stairs using a step-over-step pattern, *i.e.*, alternating feet with one foot on each step, with or without using the hand rail. *Id.*

119. None of the Student's teachers reported to Physical Therapist that the Student had any problem navigating the classroom, or getting or discarding her food in the cafeteria. *Id.*

The Student's Progress in OT During SY 2013-2014 to Date

120. At the beginning of SY 2013-2014, the Student was able to produce (*i.e.*, write) all letters, but had difficulty keeping space between words and maintaining margin awareness (*i.e.*, instead of grading her writing to the margin, she would write to the edge of the paper and then down the side). Testimony of Occupational Therapist.

121. The Student also had difficulty with the speed of her writing ("writing fluency"). *Id.*

122. The Student required three-line paper to keep her writing on the line ("line orientation"); however, two-line paper was age appropriate. *Id.*

123. As of January 2014, the Student had mastered line orientation with two-line paper, had mastered her writing fluency goal, was nearing mastery on spacing, and was responsive to visual or oral cues regarding the margin and was able to respect margins.

Id.

124. According to Occupational Therapist's records (*i.e.*, "Service Trackers"), as of January 15, 2014, the Student was able to produce legible written work with verbal cues at the beginning of the task, self-corrected her errors, and had "learned strategies to manage her needs in the area of fine motor and sensory processing skills with intermittent verbal cues." R-10-1.

125. According to Occupational Therapist's "Occupational Therapy Progress Report as of January 2014" (the "January 2014 OT Report")¹³, the Student had

demonstrated progress in the area of fine motor, visual motor, and sensory processing skills needed to access and participate in the school curriculum, particularly to complete writing assignments in the classroom. [The Student] has mastered all of her goals. [She] continues to demonstrate difficulty with her written communication.... [She] recognizes her own errors and will often self-correct before the editing process of writing occurs.... Despite her not adjusting well to the writing process, her finished product of writing is legible >80% for formation, spacing, sizing, and alignment. She has also managed to capture her thoughts onto paper.

R-13-1.

126. Occupational Therapist concluded that the Student had mastered the OT goals in her IEP, *i.e.*, (a) copying three sentences from near/far distance with uniform spacing between words and proper letter size on three-lined paper in five minutes, (b) writing three simple sentences with uniform spacing between words and proper letter size on three-lined paper in 10 minutes, (c) automatically sequencing four objects, letters

¹³ This report was not shared with Petitioner until the five-day disclosures prior to the DPH.

or words after viewing for 10 seconds, (d) identifying four out of six differences between two pictures that are similar, and (e) recalling the correct sequence of tying her shoelaces with minimal verbal support. R-13-2.

The Student's Achievement of Life Skills During SY 2013-2014 to Date

127. The Student has received instruction in cooking at Public School C.

Testimony of the Student; testimony of Petitioner (“They taught her how to make cookies and a sandwich”); testimony of Paralegal (“One time they had her learn to make cookies”).

128. The Student has received instruction in counting money at Public School C.

Testimony of the Student.

129. At the beginning of SY 2013-2014, the Student knew the values of coins but could not count them. Testimony of Special Education Teacher #2.

130. As of March 2014, the Student can add values of different denomination coins. *Id.*

131. The Student has received instruction in telling time at Public School C.

Testimony of the Student.

132. When Petitioner informed Special Education Teacher #1 that the Student was having difficulty telling time, he sent clocks home with the Student. Testimony of Petitioner.

133. The Student has worked on writing her name and address at Public School C.

Testimony of the Student.

134. The Student can read signs; however, she does not always pay attention to signs. Testimony of Petitioner.

135. Respondent introduced into evidence several “life skills work samples.” R-6. These workbook exercises all are dated in March 2014 and therefore were not available when the Student’s February 11, 2013 or January 15, 2014 IEPs were developed; accordingly, the undersigned has given no weight to these documents.

The Student’s Behavior During SY 2013-2014 to Date

136. There is no evidence in the record that the Student has been suspended or otherwise subject to any disciplinary referrals.

137. In the two or three months prior to the DPH (*i.e.*, since the end of December 2013 or the end of January 2014), Petitioner has observed the Student rocking back and forth and talking to herself at home. Testimony of Petitioner.

138. Petitioner asked the Student why she did these things and she said it was because other children in her class did so. *Id.*

139. Senior Educational Advocate has observed the Student rocking and making inappropriate hand gestures such as grabbing her face, behaviors that she did not exhibit until SY 2013-2014. Testimony of Senior Educational Advocate.

140. Neither Special Education Teacher #1 nor Special Education Teacher #2 has observed the Student rocking repetitively, mimicking other ritualistic behaviors of children with autism, or talking to herself other than reading classroom instructions aloud. Testimony of Special Education Teacher #1, testimony of Special Education Teacher #2.

141. Petitioner is concerned about the Student's safety at school because a peer kissed her and sat on her lap, and she is so trusting that she would do what anyone asked her to do. Testimony of Petitioner.

142. The Student is escorted by an adult at all times at school. Testimony of Special Education Teacher #1, testimony of Special Education Teacher #2.

143. The incident with the peer kissing the Student occurred when the Speech-Language Pathologist's attention was distracted during a group therapy session. Testimony of Special Education Teacher #1.

144. Based upon the entire record, the undersigned finds that Petitioner has not established that Public School C either is an unsafe setting for the Student or encourages her to engage in inappropriate behaviors.

The January 15, 2014 IEP Team/MDT Meeting

145. On January 15, 2014, a meeting of the Student's IEP Team was held. P-20-1, P-21-10.

146. At the meeting, Respondent distributed copies of a draft revised IEP (P-20). Testimony of Paralegal.

147. It is not uncommon for Respondent to bring draft IEPs to IEP Team meetings. *Id.*

148. Petitioner and her representatives were able to articulate their disagreements with the draft IEP. *Id.*

149. Special Education Teacher #2 stated that the Student had mastered the Mathematics goals in her IEP, and new goals were established.¹⁴ Testimony of Special Education Teacher #2, P-21-5 and -10.

150. Senior Educational Advocate stated that none of the Mathematics goals were any good because the Student required functional goals; she would never need to graph anything but would need to count money and tell time to live independently or “semi-independently.” Testimony of Senior Educational Advocate.

151. Special Education Teacher #2 explained that all of the Student’s Mathematics goals were foundational to build a higher quality of life for the Student. Testimony of Special Education Teacher #2.

152. At Petitioner’s request, Respondent agreed to add two goals to the Student’s Mathematics goals—“money” (*i.e.*, counting bills and coins) and “time” (*i.e.*, determining elapsed time and how soon a specified event might occur). *Id.*, testimony of Paralegal, testimony of Petitioner, testimony of Senior Educational Advocate, P-21-1 and -5.

¹⁴ Special Education Teacher #2 based the Student’s Mathematics goals on DCPS assessment standards, choosing among the tasks associated with those standards the ones that matched the Student’s needs and abilities. Testimony of Special Education Teacher #2. For example, she chose measuring perimeters as a goal because the Student would need to use measurement and addition in a variety of ways throughout her life, and measuring perimeters integrated those two skills. *Id.* She chose a goal involving graphing because that skill will allow the Student to interpret timetables and schedules throughout her life. *Id.* Whereas Petitioner’s representatives wanted the goals to be the end result, *e.g.*, to read a bus schedule, Special Education Teacher #2 maintained that the Student needed to develop the foundational skills before she could apply those skills to such practical tasks as reading a bus schedule. *Id.* According to Special Education Teacher #2, it is not necessary for the Student at this time to make the abstract connection between what she is learning and how she will apply it later in life. *Id.*

153. Respondent stated that the Student had made progress in Reading.¹⁵ P-21-5, -10 and -11.

154. The Student's Reading and Writing goals had been developed by Special Education Teacher #1, aligned with DCPS assessment standards.¹⁶

155. Petitioner's representatives requested the addition of a written expression goal, specifically that the Student learn to read and write a note, but Respondent's representatives replied that they thought this goal was too advanced for the Student and they did not want to "overtax" her. Testimony of Senior Educational Advocate¹⁷; *accord*, testimony of Paralegal.

156. With regard to daily living skills training, Respondent's representatives stated that Respondent does not have such a class, that such training is incorporated into other classes, and that such training is not on the Student's IEP. Testimony of Paralegal; P-21-3, -8, -9 and -14.

¹⁵ Senior Educational Advocate testified that the Student needed goals of reading lists, reading directions, reading signs (particularly safety signs) and increasing her vocabulary rather than goals of analyzing literature and learning Greek and Latin roots. However, there is no indication in three sets of notes that she requested these goals at the January 15, 2014 IEP Team Meeting. P-21-1 through -14.

¹⁶ Special Education Teacher #1 testified that the Reading goals he selected require the Student to utilize comprehension skills and to analyze what she reads, thereby promoting understanding and building the foundation for her to thrive in daily life (*e.g.*, being able to read a recipe in a newspaper). Testimony of Special Education Teacher #1. The subtasks of each goal represent functional skills. *Id.*

¹⁷ Senior Educational Advocate testified that the Student would benefit more from a goal of writing a shopping list, using pictorials as well as words, or a goal of writing directions. However, there is no indication in three sets of notes that she requested these goals at the January 15, 2014 IEP Team Meeting. P-21-1 through -14.

157. Special Education Teacher #2 stated that the program was “primarily academic,” that the Student’s goals had to be aligned with DCPS assessment standards and that life skills were not the focus of the program. Testimony of Paralegal, testimony of Special Education Teacher #2.

158. According to notes of the January 15, 2014 IEP Team meeting taken by Senior Educational Advocate (P-21-1 through 5), Paralegal (P-21-6 through -9) and Respondent (P-21-10 through 14), and Senior Educational Advocate’s follow-up letter to SEC (P-21-15 and -16), neither Petitioner nor her representatives raised any concern about the Student mimicking inappropriate behaviors.¹⁸

159. Physical Therapist presented a discharge summary (*i.e.*, Physical Therapy Progress Report, P-23-1), stating that the Student had made a lot of progress, providing photographs of the Student participating in PT activities, and stating her view that it was appropriate to discontinue PT services, without the need for a formal assessment.¹⁹

P-21-2, -6, -7 and -12; P-23; testimony of Paralegal; testimony of Physical Therapist.

160. Petitioner’s representatives asked Respondent to conduct a PT evaluation, which Physical Therapist initially resisted because she already had prepared the Physical

¹⁸ Moreover, the DPC did not allege that the Student’s January 15, 2014 IEP denied her a FAPE because it failed to address her behavior, or that Public School C was an inappropriate LOS because it encouraged the Student to mimic inappropriate behavior of peers with autism. P-1. Accordingly, no such issues were accepted for this DPH (P-8-2 and -3) and the testimony regarding the Student’s mimicry of inappropriate behaviors is not relevant to any issue in the instant case.

¹⁹ Paralegal testified that Physical Therapist presented this not as a recommendation but as a predetermination. Consistent with this assertion, Physical Therapist testified, “ultimately, I’m the professional.” Physical Therapist apparently misunderstands her role and authority. The IEP Team, not the service provider, determines whether and what services are needed. Physical Therapist’s strident style, apparent during her testimony, likely alienated Petitioner and her representatives at the January 15, 2014 IEP Team meeting.

Therapy Progress Report; she later agreed to conduct an evaluation although she stated she would come to the same conclusion. Testimony of Physical Therapist, testimony of Paralegal.

161. Senior Educational Advocate responded, “well in that case we would want an IEE [Independent Educational Evaluation].” Testimony of Paralegal; *accord*, testimony of Senior Educational Advocate.

162. Physical Therapist did not need to eliminate services to the Student to make time available on her schedule for other children. Testimony of Physical Therapist.

163. Occupational Therapist stated that the Student had mastered all of her OT goals and was able to produce legible writing in the classroom. Testimony of Occupational Therapist.

164. Occupational Therapist proposed reducing the Student’s OT services from 120 minutes per month of direct services to 60 minutes per month of consultation services. *Id.*; P-21-2, -7, -8 and -13.

165. By consultation services, Occupational Therapist meant implementing a coaching model whereby the teachers and paraprofessionals in the Student’s classroom would reinforce strategies on a full time basis so that the Student could generalize the skills she had learned, which would make her more independent in the classroom. Testimony of Occupational Therapist.

166. When providing consultation services, Occupational Therapist occasionally observes a child in the classroom and changes strategies if the current strategies are not effective. *Id.*

167. Petitioner asked Occupational Therapist if she had data to support the reduction, to which Occupational Therapist replied that she kept records.²⁰ P-21-2 and -8.

168. Advocate expressed her opinion that the change from direct to consultation services constituted a discontinuation of OT. Testimony of Occupational Therapist.

169. After some discussion by the IEP Team, Petitioner's representatives asked if the OT services could continue to be provided as direct services. *Id.*

170. Occupational Therapist offered to continue to provide direct OT services, at the rate of 60 minutes per month, which Petitioner's representatives rejected, requesting continuation of the current 120 minutes per month. *Id.*

171. Occupational Therapist asked Petitioner's representatives what OT deficits they noticed, but they did not articulate any deficits²¹, stating that they "just felt 60 minutes was not enough." *Id.*

172. The Student's teachers agreed that her writing was legible and they welcomed OT consultation. *Id.*

173. Petitioner's representatives stated that they wished to review Occupational Therapist's data but they did not request that Occupational Therapist conduct an evaluation. *Id.*

²⁰ Occupational Therapist subsequently prepared the January 2014 OT Report (R-13), which she testified she intended to discuss with the IEP Team at their next meeting, but no such meeting has been convened. Testimony of Occupational Therapist.

²¹ Apparently Petitioner's representatives believe that the purpose of OT is to maximize a child's fine motor skills for all purposes. As Occupational Therapist testified, however, the purpose of OT in the school setting is not "remediation"; rather, its purpose to ensure that a child has the fine motor skills and/or compensation techniques to avoid adverse impact on the child's educational performance. Testimony of Occupational Therapist.

174. At that point, Petitioner's representatives stated that they were not in agreement with the draft IEP "in its totality" and the meeting adjourned with the parties in disagreement over the Student's IEP. *Id.*, P-21-4 and -8.

175. Occupational Therapist did not need to reduce services to the Student to make time available on her schedule for other children. *Id.*

176. Based upon the entire record, particularly the testimony of Physical Therapist and Occupational Therapist, the undersigned finds that Respondent had sufficient basis at the January 15, 2014 IEP Team meeting to determine the Student's current needs for PT and OT services and no additional data were required.

Correspondence Regarding the January 15, 2014 IEP Team/MDT Meeting

177. On January 16, 2014, Senior Educational Advocate wrote to SEC expressing concerns (a) that the Student's IEP did not include "functional goals," (b) that PT was discontinued without a formal evaluation, (c) that OT was changed without data being provided to support the change, and (d) that the Student was not being provided a daily living skills program. P-21-15 and -16.

178. In her January 16, 2014 letter, Senior Educational Advocate quoted Physical Therapist as saying that if she did an evaluation she would not find the Student eligible, and that Senior Educational Advocate responded "that we would have to require an independent evaluation since she had already decided that she was not eligible." P-21-15. In response to a question from the undersigned, Senior Educational Advocate acknowledged that this request for an independent evaluation was conditional. Testimony of Senior Educational Advocate.

Appropriateness of the Student's IEP Developed on January 15, 2014

179. The academic goals in the Student's January 15, 2014 IEP included references to DCPS assessment standards, *e.g.*, "6PRA9: Produce and interpret graphs that represent the relationship between two variables (x and y) in everyday situations." P-20-4.

180. The Student's academic goals included tasks specific to her, *e.g.*, "When given 5 real world mathematical problems that require graphing coordinates in the first quadrant, [the Student] will correctly graph points and interpret the coordinate points in the context of the problem for 4 out of 5 times (*e.g.* 'The school is located at (5, 5) and the ice cream shop is 4 squares west and 1 square south, what is the location of the ice cream shop? Is the school closer to the ice cream shop or to the library which is located at (7, 1)?')." *Id.*

181. Based upon the entire record, the undersigned finds that the academic goals in the Student's January 15, 2014 IEP are appropriate for her, and that the derivation of these goals from DCPS assessment standards does not render those goals inappropriate.

182. Based upon the entire record, the undersigned finds that the Student did not require specific goals in daily living skills, as those skills were incorporated into her academic goals which provide a foundational basis for independent living.

183. Based upon the entire record, including the progress made by the Student from the beginning of SY 2013-2014 to January 15, 2014, the undersigned finds that the IEP developed for the Student at the IEP Team meeting on that date was reasonably calculated to confer educational benefit upon her.

The Student's March 13, 2014 Physical Therapy Assessment

184. On March 13, 2014, Physical Therapist conducted an assessment of the Student, based upon a review of records; interviews²² with the Student, Petitioner, and Special Education Teacher #2; behavioral observations; and clinical assessments. R-2-1 and -2.

185. Physical Therapist found that the Student has normal muscle tone, range of motion within functional limits, functional strength in her extremities and trunk, adequate endurance for school activities, adequate motor planning for school, adequate postural control, adequate coordination, adequate balance for school activities, and a stable gait despite walking flat footed with her feet outward and sometimes dragging her feet. R-2-2 and -3.

186. Physical Therapist found that the Student was able to navigate the classroom independently and with adequate endurance, was able to climb stairs using a mature step-over-step gait pattern with and without holding onto a handrail. R-2-3.

187. Physical Therapist found that the Student was able to transfer from sitting to standing independently without a loss of balance, was able to climb bleachers, and was able to lower herself to sit on the floor and stand back up again independently without loss of balance. *Id.*

188. Physical Therapist found that the Student was able to handle her food tray in the cafeteria and eat independently. *Id.*

189. Physical Therapist found that the Student was able to bounce and dribble an eight-inch ball while walking with control, to walk backwards, to walk on tiptoes, to

²² These interviews might more accurately be described as informal discussions. Testimony of Physical Therapist, testimony of Petitioner.

jump over 12-inch hurdles, to skip, to run, to stand on one foot for eight to 10 seconds, and to kick a rolling ball, all without loss of balance. R-2-4.

190. Physical Therapist found that the Student was able to open and close school doors, to access the bathroom, to access the stall to use the commode independently, and to access the sink, soap and paper towel dispenser independently. *Id.*

191. Physical Therapist found that the Student was able to access the water fountain in the hallway independently and sip water. *Id.*

192. Petitioner disagrees with some of Physical Therapist's findings, specifically that the Student can stand on one foot for eight to 10 seconds, kick a rolling ball or jump over 12-inch hurdles. Testimony of Petitioner.

193. Petitioner's representatives received the report of the March 13, 2014 assessment on March 20, 2014 when it was included in Respondent's five-day disclosures prior to the DPH. Testimony of Paralegal.

194. Subsequent to receipt of the report of the March 13, 2014 assessment, Petitioner and her representatives have not requested an IEE. *Id.*, testimony of Senior Educational Advocate.

195. Based upon the entire record, the undersigned finds that the Student has adequate gross motor functional mobility and skills to be able to safely access her school environment and participate in activities with her peers.²³ The undersigned makes no finding as to whether additional PT would enable the Student to develop better physical

²³ Petitioner appears to misunderstand the role of PT as a "related service" under IDEA. For example, she testified that she believed PT should enable the Student to learn to ride a bicycle, which clearly is not required for the Student to access her education. Rather, as Physical Therapist testified, the purpose of PT in the school setting is to ensure that a child can access the curriculum by demonstrating mobility in the classroom, hallways, cafeteria and playground.

skills (*i.e.*, to maximize her gross motor functional ability), as that finding would not be relevant to any issue accepted for this DPH.

Petitioner's Compensatory Education Plan

196. Senior Educational Advocate recommended, as compensatory education for the allegedly improper placement of the Student from January through March 2013 and SY 2013-2014 to date, that Respondent fund (a) the Student's transportation to and from and attendance at Private Summer Program, comprising eight weeks (200 hours) focused on life skills and other functional skills that will lead to independent living; and (b) the Student's attendance at Non-Public School instead of Public School C. P-1-2 and -3; testimony of Senior Educational Advocate.

197. Senior Educational Advocate was not able to quantify the educational harm suffered by the Student during each of the periods of alleged denial of FAPE, or to associate either of the two types of compensatory education with each such period. Testimony of Senior Educational Advocate.

198. Senior Educational Advocate testified that the Student would not benefit from tutoring. *Id.*

Non-Public School

199. Non-Public School is a private day school for students with developmental disabilities working toward certificates rather than high school diplomas. Testimony of Clinical Coordinator, Non-Public School; P-42-1.

200. Non-Public School has a self-contained ID program (*i.e.* a full time outside of general education program limited to children whose primary disability classification is ID) that Clinical Coordinator considers to be appropriate for the Student. *Id.*

201. The program for children with ID is a blend of academic instruction and daily life skills training including “culinary arts” and “housekeeping.” *Id.*

202. Non-Public School is approved by the District of Columbia Office of the State Superintendent of Education (“OSSE”) Division of Specialized Education for students with ID. Testimony of Clinical Coordinator, Non-Public School; P-45-4.

203. The Student attended Non-Public School for two days and “did very well.” Testimony of Clinical Coordinator.

204. Non-Public School determined that the Student would “be a good fit.” *Id.*

205. The Student has been accepted to Non-Public School and could begin attending immediately. *Id.*

206. The cost of Non-Public School is Two Hundred Twenty Dollars (\$220.00) per day. *Id.*

Private Summer Program

207. Private Summer Program provides educational services, mentoring and tutoring to students of Respondent and charter schools and implements compensatory education awards. Testimony of Owner, Private Summer Program.

208. Private Summer Program has experience in providing compensatory education in life skills training. *Id.*

209. Private Summer Program assesses children's needs to determine how to tailor academic instruction and life skills training to their needs and track their progress.

Id.

210. If the Student attended Private Summer Program, she would attend four days per week, in two-week segments with themes, receiving instruction in Mathematics, Reading, and daily living skills. *Id.*

211. As an example of instruction in daily living skills, the Student would receive instruction in counting money and then travel to a store to count change in the community setting. *Id.*

212. Academic instruction and daily living skills training would be coordinated, *e.g.*, the Student would work on word problems that incorporated the use of pretend or real money. *Id.*

213. The cost of Private Summer Program is Fifty-Five Dollars (\$55.00) per hour. *Id.*

Appropriate Compensatory Education for Denial of FAPE From January 4 through February 11, 2013

214. Based upon the entire record, in particular the consistent testimony of witnesses for Petitioner and Respondent regarding the Student's need for constant repetition of instruction to maintain her skills,²⁴ the undersigned finds that the appropriate compensatory education for the failure of Respondent to implement an IEP for the Student for the five-week period from January 4 through February 11, 2012, is an

²⁴ For example, Special Education Teacher #5 testified that the Student regressed whenever there was a break in school, including long weekends. Testimony of Special Education Teacher #5.

equivalent number of weeks of instruction in academic subjects and daily living skills, during periods that do not conflict with the instruction she would otherwise receive during the school year and summer ESY.

VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VIII. CREDIBILITY

The undersigned found all of the witnesses to be entirely credible, to the extent of their first hand knowledge or professional expertise.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended “(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C. §1400(d)(1); *accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a FAPE. FAPE means:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

IEP

3. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)).

4. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982) (“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 201.

5. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) (“Academic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’”) (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student’s progress, courts should defer to the administrative agency’s expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (“Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP’s substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an “education ... designed according to the parent's desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ.*, Hawaii, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while “sympathetic” to parents' frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

K.S. v. District of Columbia, ___ F. Supp. 2d ___, 113 LRP 34725 (2013).

6. The LEA “has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE.” *Schoenbach v. District of Columbia*, 46 IDELR 67, 106 LRP 46342 (D.D.C. 2006). IEP decisions are not made by majority vote. Rather, “[i]f the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.” *Id.*, citing 34 C.F.R. Part 300, Appendix A -- Notice of Interpretations, 64 Fed. Reg. 12,473 (1999).

When an IEP is Required

7. The requirement of an IEP applies once “a determination is made that a child has a disability and needs special education and related services” 34 C.F.R. §300.306(c)(2).

8. As noted by the U.S. District Court for the District of Columbia in *District of Columbia v. West*, 54 IDELR 117, 110 LRP 19316 (D.D.C. 2010), quoting *James ex rel. James v. Upper Arlington City School Dist.*, 228 F.3d 764, 768 (6th Cir. 2000), a child returning to an LEA need not reenroll in school or re-request an MDT meeting to trigger the LEA’s obligation to develop an IEP:

Under the IDEA, “the obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment.” ... The District’s offer to convene an MDT meeting for A.C. was always predicated upon her re-enrollment, a condition that was not required by the IDEA. As such, A.C. was neither required to re-enroll before requesting an MDT nor required to re-request an MDT after her re-enrollment.

9. Thus, Respondent’s requirement that the Student, who had a current District of Columbia IEP requiring a full time outside of special education program (Findings of Fact 5, 18 and 26 n.5) attend a general education classroom without receiving specialized instruction or related services from January 2013 through February 11, 2013 (Finding of Fact 15) before she would be offered a FAPE imposed a condition not provided for in IDEA or its implementing regulations, and inconsistent with Respondent’s obligation to provide FAPE.

10. Accordingly, the undersigned concludes that Respondent denied the Student a FAPE from January 4, 2013, when Petitioner attempted to re-enroll her in Public School B’s self-contained ID program (Findings of Fact 11 and 12), until February 11, 2013, when an IEP was developed for her (Finding of Fact 23).

Location of Services

11. When determining a student's LOS, the LEA must select a setting that is able to *substantially* implement the IEP. As recently stated by the United States District Court for the District of Columbia in *Johnson v. District of Columbia*, ___ F. Supp. 2d ___ (Civ. No. 12-0352 (RBW), August 27, 2013):

Because the plaintiffs are entitled to reimbursement for F.J.'s education at Accotink only if the defendant has deprived F.J. of a FAPE, the Court begins its analysis with that assessment. See 20 U.S.C. §§1412(a)(10)(C)(ii). In order to provide a student with a FAPE, the student's education must be "provided in conformity with the IEP" developed for her, and therefore, the educational agency must place the student in a setting that is capable of fulfilling the student's IEP. See *id.* § 1401(9); 34 C.F.R. §300.116 (2012) (providing that a child's educational placement "[i]s based on the child's IEP"); *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (citing § 1401(9)).

As an initial matter, the parties disagree as to the standard the Court must apply in assessing the plaintiffs' claim that DCPS deprived F.J. of a FAPE. Citing *Hinson v. Merritt Educational Center*, 579 F. Supp. 2d 89 (D.D.C. 2008), the plaintiffs assert that "the Hearing Officer incorrectly imported the standard applicable to claims of a failure to implement an IEP," and assessed whether Ballou was able to substantially implement the IEP, whereas "the proper standard . . . is whether or not it can implement the IEP as written." Pls.' Mem. at 8–9. The defendant, on the other hand, urges the Court to apply the same standard used by the hearing officer and to require the plaintiffs to show "more than a de minimis failure to implement all elements of [the] IEP" in order to succeed on their claim. Def.'s Mem. at 13–14 (quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007)). The Court agrees with the defendant.

The plaintiffs have misread *Hinson v. Merritt Educational Center* as requiring that a student's placement conform to the IEP "as written." See Pls.' Mem. at 7–9; Pls.' Opp'n at 5–6. To be sure, in *Hinson*, another member of this Court held that the appropriateness of the student's placement must be evaluated with reference to the IEP "as written," *Hinson* 579 F. Supp. 2d at 104, but the plaintiffs' interpretation of this phrase is incorrect when the Court's words are placed in context. In *Hinson*, the plaintiff argued that the school designated by DCPS was an inappropriate placement because it could not meet the plaintiff's proposed standards for her child's IEP. *Id.* The Court's conclusion that "to show that placement is inappropriate, plaintiff must show that [the school] is unable to implement the IEP as written," therefore refers to evaluating a placement from the standpoint of how the IEP is actually drafted, and not from the perspective of how a parent believes the

IEP ought to be written. *Id. Hinson* does not, as the plaintiffs suggest, support the proposition that a proposed placement is appropriate only if the school is capable of fulfilling every requirement of the IEP exactly as written. The plaintiffs cite to no other authority to support their argument that a placement must be able to satisfy all of the requirements of the IEP “as written,” and the Court’s research has found none.

The standard used by the hearing officer and pressed by the District is the standard formulated by the Fifth Circuit for failure-to-implement claims in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), and widely adopted by other federal courts. See, e.g., *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 821–22 (9th Cir. 2007); *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App’x 184, 187 (3d Cir. 2006); *Garmany v. Dist. of Columbia*, ___ F. Supp. 2d ___, ___, 2013 WL 1291289, at *3 (D.D.C. 2013); *Savoy*, 844 F. Supp. 2d at 31. This standard requires that a plaintiff “must show more than a de minimis failure to implement all elements of [the student’s] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP” in order to prevail on a failure-to-implement claim. *Catalan*, 478 F. Supp. 2d at 75 (quoting *Bobby R.*, 200 F.3d at 349), *aff’d sub nom. E.C. ex rel. Catalan v. Dist. of Columbia*, No. 07-7070, 2007 U.S. App. LEXIS 21928 (D.C. Cir. Sept. 11, 2007). Courts applying this standard “have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citations omitted).

The defendant’s view finds support in both logic and case law. In order to provide a FAPE, after an IEP is designed, the District “must . . . implement the IEP, which includes placement in a school that can fulfill the requirements set forth in the IEP.” *Pabo*, 573 F. Supp. 2d at 53 (citing §1401(9)); see also *Savoy*, 844 F. Supp. 2d at 31 (characterizing the plaintiff’s claims that the school to which the student was assigned after he aged out of his prior placement “failed to provide the number of hours and types of services required by [the student’s] IEP” as failure-to-implement claims). At bottom, an allegation that a student’s placement is not appropriate because the school cannot implement one or more provisions of that student’s IEP is a claim that the educational authority has failed to properly implement the student’s IEP by placing the student at a school which is capable of implementing it. The fact that the plaintiffs’ claim here is a “prospective” challenge, which arises “at [a] different point[] in the process of implementing and developing an IEP” from a claim which alleges that a school has failed to implement a student’s IEP during the student’s attendance there, Pls.’ Opp’n at 5, is a distinction without a difference. The Court sees no logical reason to require perfect compliance with a student’s IEP in determining an appropriate placement when, as the plaintiffs concede, imperfect compliance with the IEP would be permissible once the student begins attending the school. See *id.* Accordingly, because placing a student in

an appropriate educational setting is an element of implementing the IEP, the Court will assess the appropriateness of F.J.'s proposed placement at Ballou by determining whether Ballou was capable of substantially implementing F.J.'s IEP.

The plaintiffs contend that F.J.'s placement at Ballou is inappropriate because Ballou is incapable of providing F.J. with the thirty-one hours of specialized instruction required by her IEP and does not have the necessary staff to provide adequate instruction in Spanish and physical education, both required for F.J. to receive a diploma. Pls.' Mem. at 8–10. Shamele Straughter, Ballou's Special Education Coordinator, confirmed that students in Ballou's program are in school for a total of 32.5 hours each week but receive only 28.25 hours per week of actual instruction after breaks are subtracted. See A.R. at 363–64. Ms. Straughter testified, however, that “when individuals create IEPs that are 32 hours, what they are actually trying to do is ensure that [the students] do not engage with their non-disabled peers during non-instructional time[,] which include[s] lunch and transition.” A.R. at 359–60. The plaintiffs attempt to discredit this testimony by arguing that such an interpretation is inconsistent with the generally understood meaning of “instruction” and noting that Ms. Straughter was not part of the Team that developed F.J.'s IEP, see Pls.' Opp'n at 2–3, but they failed to offer any evidence that contradicted Ms. Straughter's hearing testimony. In any event, even if F.J.'s IEP is read as calling for precisely thirty-one hours of instructional time, the difference between thirty-one and a little over twenty-eight does not constitute a material deviation from the requirements of the IEP. Admittedly, a deviation in hours of instruction can, in certain circumstances, be a substantial deviation resulting in the denial of a FAPE. See, e.g., *Van Duyn*, 502 F.3d at 823 (finding that a 50% deprivation of hours was material); see also *Heffernan*, 642 F.3d at 481 (finding that providing seven and a half to ten hours of the required fifteen hours, in combination with the school's failure to use the teaching method specified in the IEP, was material). However, a comparison of the hours that would have been provided by Ballou with the hours mandated by the IEP reveals that the deviation alleged here is relatively slight, as Ballou was capable of providing F.J. with 91% of the hours of specialized instruction required by her IEP. Other members of this Court have reached the same conclusion when faced with similar deviations. See, e.g., *Savoy*, 844 F. Supp. 2d at 34 (finding that a difference of less than one hour per week was not material); *Catalan*, 478 F. Supp. 2d at 76 (holding that failure to receive “a handful of sessions” of therapy and therapist's shortening of several other sessions was not material). The situation here is in stark contrast to the losses in *Sumter* (50–67% of the hours required by the IEP per week) and *Van Duyn* (50% of hours required by the IEP). Moreover, the Court notes that the private placement selected for F.J. (*Accotink*), provides similar hours as Ballou—30.5 hours of school per week and 28.33 hours of actual instruction. A.R. at 187–88. While not dispositive, the fact that F.J. received less than the number of specialized instruction hours called for by the IEP at *Accotink* and approximately the same number of hours she would have received at Ballou, is proof that the discrepancy in hours Ballou would have provided is not material.

12. No provision of IDEA or its implementing regulations requires an IEP Team meeting to determine the Student's LOS if the Student's placement is not fundamentally changed; accordingly, Petitioner's insistence upon such a meeting prior to enrolling the Student at Public School B (Findings of Fact 30 and 34) was unjustified.

13. Because Public School C could substantially implement the Student's February 11, 2013 IEP (Finding of Fact 80), it was an appropriate LOS for her for SY 2013-2014.

14. Because Public School C can substantially implement the Student's January 15, 2014 IEP (*Id.*), it remains an appropriate LOS for her.

Implementation of the IEP

15. If an appropriate IEP is developed, but the LEA fails to implement the IEP fully, the failure constitutes a denial of FAPE only if the failure is "material." *See, e.g., Banks v. District of Columbia*, 720 F. Supp. 2d 83 (D.D.C. 2010).

16. Respondent's total failure to implement an IEP for the Student from January 4 through February 11, 2013 was material (Finding of Fact 16), hence a denial of FAPE.

17. Although Respondent did not fully implement the Student's February 11, 2013 IEP from February 11 through mid-March 2013 (Finding of Fact 27), in the absence of record evidence of the degree to which Respondent failed to implement the IEP (Finding of Fact 53), no denial of FAPE can be found for that period.

18. As for the period after March 15, 2013 until the Student began attending Public School B, in addition to the lack of evidence of the degree of failure to implement the IEP, it was Petitioner's conduct that caused the delay. Specifically, by requiring an IEP Team meeting to assign Public School B as the Student's LOS, Petitioner was

responsible for the Student remaining at Public School A past March 15, 2013.²⁵ Finding of Fact 42 n.8.

Reevaluation, Assessments and Independent Educational Evaluations (“IEEs”)

19. Unless the parent and the LEA agree that a reevaluation is unnecessary, a reevaluation of a child with a disability must be conducted at least once every three years, or more frequently if conditions warrant reevaluation, if the child’s parent or teacher requests a reevaluation, or before determining that a child is no longer a child with a disability; but no more frequently than once a year unless the parent and the LEA agree otherwise. 20 U.S.C. §1414(a)(2); 34 C.F.R. §300.303; DCMR §5-E3005.7.

20. There is no evidence in the record that Petitioner requested a reevaluation prior to the January 15, 2014 IEP Team meeting.

21. There is no requirement in IDEA or its implementing regulations that a reevaluation be conducted before a child’s IEP is revised; to the contrary, IDEA permits the IEP Team and other qualified professionals, as appropriate, to determine that no additional data are needed to determine the child’s educational needs. 20 U.S.C. §1414(c)(4); 34 C.F.R. §300.305(d).

²⁵ Although enrollment cannot be a precondition of an offer of FAPE, there is no provision of IDEA, or its implementing regulations, or any case law, supporting Petitioner’s assertion that a student need not enroll in (or register at) a school to *receive* FAPE once FAPE has been offered; accordingly, Petitioner was responsible for the Student remaining at Public School A after Respondent authorized her attendance at Public School B. In any event, Petitioner did not assert in the DPC, or at the PHC, that Respondent denied the Student a FAPE by requiring her to attend Public School A past mid-March and the issues accepted for this DPH in the PHO (HO-8-2 and -3) did not include such an issue for resolution.

22. If the IEP Team determines that no additional data are needed to determine the child's educational needs, the LEA must notify the child's parents of that determination and the reasons for the determination, and of the parents' right to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs.²⁶ 20 U.S.C. §1414(c)(4); 34 C.F.R. §300.305(d).

23. The LEA is not required to conduct such an assessment unless requested to do so by the child's parents. 20 U.S.C. §1414(c)(4)(b); 34 C.F.R. §300.305(d)(2).

24. The right to an assessment is not necessarily the right to an IEE at public expense; rather, the LEA determines whether to conduct the assessment or fund an IEE. If the LEA obtains an assessment and the parent disagrees with that assessment, the parent *then* has the right to an IEE. 34 C.F.R. §300.502(a)(1).

25. In the instant case, the IEP Team determined, and the undersigned concurs, that the information provided by the Student's Physical Therapist and Occupational Therapist was sufficient to determine the Student's current PT and OT needs, and that no additional data were required. Finding of Fact 176.

26. Petitioner asserts that a student cannot be "exited" from a "related service" such as OT or PT without a formal assessment of the Student's needs for those services. That assertion is not supported by IDEA or its implementing regulations.²⁷

²⁶ Although it appears that Respondent did not notify Petitioner of this right, Petitioner's representatives asserted such a right at the meeting, rendering any failure to notify moot.

²⁷ Apparently Petitioner is confusing, or conflating, "exiting" a child from a "related service" with "exiting" the child from special education altogether. With exceptions not relevant here, an LEA must evaluate a child with a disability in accordance with 34 C.F.R. §§300.304 through 300.311 "before determining that the child is no longer a child

27. Subsequent to the filing of the instant DPC, Respondent conducted a PT assessment (R-2). If Petitioner disagrees with that assessment, Petitioner may request an IEE, and if Respondent denies the request, Petitioner may file a new DPC. To date, no such request for an IEE has been made. Finding of Fact 194.

Authority of Hearing Officer to Order Prospective Placement in Private School ²⁸

28. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) (“*Reid*”). In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) (“*Branham*”).

29. The IDEA provides that an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the agency made a FAPE available to the child:

If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.

Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir. 1991); *see also, Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) (“Although the IDEA guarantees a free

with a disability.” 34 C.F.R. §300.305(e)(1); *accord*, DCMR §5-E3005.6. In the instant case, Respondent did not determine that the Student no longer was a child with a disability, so the precondition of a mandatory evaluation was not triggered.

²⁸ Respondent refers to private schools as “non-public schools.”

appropriate education, it does not, however, provide that this education will be designed according to the parent's desires.”)

30. Based upon the entire record, including the fact that Respondent serves children with ID at the elementary school level in a self-contained ID classroom, the undersigned is persuaded that the self-contained ID classroom at Non-Public School would be a *better* program for the Student than self-contained classroom at Public School C where the Student is the only child with a primary disability classification of ID. However, IDEA does not require Respondent to assign the LOS that is *better* for the Student, only one that is *appropriate*. *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (“[P]roof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”).

Compensatory Education

31. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid* at 521-24. That relief may include compensatory award of prospective services:

When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.

Id.

32. In all cases, an order of relief must be evidence-based. *Branham*. Educational programs, including compensatory education, must be qualitative, fact-intensive, and “above all tailored to the unique needs of the disabled student.” *Id.*

33. Mechanical calculation of the number of hours of compensatory education (a “cookie-cutter approach”) is not permissible. *Reid*. Rather, compensatory awards “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” *Id.* Awards compensating past violations must “rely on individual assessments.” *Id.*

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

Id.

34. However, formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an “individually-tailored assessment.” *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (*citing Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (internal quotation marks omitted)).

35. In the instant case, Respondent denied the Student a FAPE from January 4 through February 11, 2013 by requiring her to attend a general education classroom without any specialized instruction, when she required full time outside of general education specialized instruction. Conclusion of Law 16.

36. The appropriate compensatory education for this denial of FAPE is an equivalent number of weeks of academic instruction and daily life skills training at times that do not conflict with the regular school term or summer ESY. Finding of Fact 214.

Summary

37. From January 4 through February 11, 2013, Respondent denied the Student a FAPE by failing to implement her March 13, 2012 IEP while she attended Public School A.

38. From January 4 through February 11, 2013, Respondent denied the Student a FAPE by requiring her to attend Public School A prior to developing a new IEP for her and determining her placement and LOS.

39. On or about February 11, 2013, Respondent did not deny the Student a FAPE because the goals in the IEP developed for her were appropriate.

40. Petitioner did not meet her burden of proof that Respondent's failure to implement the Student's February 11, 2013 IEP from February 12, 2013 through mid-March 2013 while she attended Public School A was material; accordingly, Respondent did not deny the Student a FAPE during that period.

41. On or about June 20, 2013, Respondent did not deny the Student a FAPE by assigning her to attend Public School C for SY 2013-2014 because even though Public School C does not have a program specific to students with ID, Public School C can implement the Student's IEP.

42. On or about January 15, 2014, Respondent did not deny the Student a FAPE by basing the goals in her IEP on DCPS assessment standards because the goals were sufficiently tailored to her needs and abilities and reasonably calculated to confer educational benefit.

43. On or about January 15, 2014, Respondent did not deny the Student a FAPE by discontinuing PT services without conducting new clinical testing because no such

testing was required. On or about January 15, 2014, Respondent did not deny the Student a FAPE by determining that PT services would be discontinued prior to obtaining input from Petitioner and other members of the IEP Team, because Physical Therapist's recommendation was in fact discussed at the IEP Team meeting and the IEP Team members including Petitioner were able to provide input.

44. On or about January 15, 2014, Respondent did not deny the Student a FAPE by revising OT from direct services to consultation without conducting new clinical testing of the Student because no such testing was required. On or about January 15, 2014, Respondent did not deny the Student a FAPE by revising OT from direct services to consultation without and prior to obtaining input from Petitioner or other members of the IEP Team, because Occupational Therapist's recommendation was in fact discussed at the IEP Team meeting and the IEP Team members including Petitioner were able to provide input.

45. Since January 15, 2014, Respondent has not denied the Student a FAPE by failing or refusing to conduct assessments or fund independent assessments of the Student's need for PT despite Petitioner's request for such assessments because Respondent has conducted an assessment and Petitioner has not subsequently requested an IEE.

X. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. Respondent shall fund the following services as compensatory education for the denial of FAPE to the Student: 100 hours of instruction in academic subjects and daily living skills training at Petitioner's choice of providers in the District of Columbia, not to exceed Fifty-Five Dollars (\$55.00) per hour, plus transportation, to be provided only during the weeks of June 23 and June 30, 2014 (*i.e.* between the end of DCPS School Year 2013-2014 and the beginning of summer ESY) and/or the weeks of August 4, 11 and 18, 2014 (*i.e.* between the end of summer ESY and the beginning of DCPS School Year 2014-2015).

2. No later than May 9, 2014, Petitioner shall inform Respondent, via email or facsimile to the Student's case manager, what provider she has selected to provide the compensatory education services (the "Comp. Ed. Provider"), and the names, telephone numbers and email addresses of one or more staff members or representatives of the Comp. Ed. Provider.

3. June 2014 IEP Team/MDT Meeting:

(a) No later than May 23, 2014, Respondent shall schedule a meeting to be held between June 9 and 20, 2014, of the Student's Individualized Education Program ("IEP") Team or Multidisciplinary Team ("MDT"), with all necessary members, including Petitioner.

(b) The purposes of the meeting shall include the following:

(i) to review the Student's progress since the last IEP Team/MDT meeting;

(ii) to determine the Student's IEP goals for the summer of 2014, or if those goals already have been determined, to review and revise those goals if and as appropriate; and

(iii) to discuss how the Comp. Ed. Provider can assist the Student's achievement of those goals.

(c) Respondent shall invite the staff member(s) or representative(s) of the Comp. Ed. Provider that Petitioner identified pursuant to paragraph 2 above.

(d) Each such staff member or representative of Comp. Ed. Provider, and Petitioner's representatives (attorney, paralegal and/or educational advocate) shall be permitted to attend the meeting in person or by telephone at his or her option, and to participate in the discussion.

(e) At the meeting, Respondent shall identify one or more DCPS teachers or staff members who will be available by telephone and/or email from June 23 through July 3, 2014 and from August 4 through 22, 2014, with whom the Comp. Ed. Provider may communicate (the "DCPS Point(s) of Contact" or "POC(s)").

(f) At the meeting, Respondent shall provide the telephone numbers and email addresses or facsimile numbers of each such POC.

(g) At the meeting, Respondent shall provide Petitioner any consent form(s) or release(s) that may be required for the Comp. Ed. Provider and the POC(s) to discuss the Student.

(h) If Petitioner attends the meeting in person, Petitioner shall execute any such form(s) or release(s) at the meeting.

(i) If Petitioner participates in the meeting by telephone, Respondent shall provide the form(s) or release(s) to Petitioner via email no later than the day of the meeting, and Petitioner shall return the executed form(s) or release(s) by hand-delivery, email or facsimile no later than the fifth business day after the meeting.

4. No later than the fifth business day after the meeting described in Paragraph 3 above, Petitioner shall send the Comp. Ed. Provider, by hand-delivery, email or facsimile, with a copy to the DCPS POC(s) also by hand delivery, email or facsimile, written instruction for the Comp. Ed. Provider to communicate to the DCPS POC(s), each week that the Student receives services from that provider, regarding the progress the Student has made, what difficulties she has experienced, and any other information that might assist Respondent in providing specialized instruction and related services to the Student.

5. All written communications from Respondent to Petitioner concerning the above matters, including but not limited to scheduling of the IEP Team/MDT meeting, shall include copies to Petitioner's counsel by facsimile or email.

6. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

7. Petitioner's other requests for relief are DENIED.

Dated this fourth day of April, 2014.

A handwritten signature in cursive script, reading "Charles Carron".

Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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. § 1415(i)(2).