

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

Office of Dispute Resolution
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Office of Dispute Resolution
September 15, 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:</p> <p>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 July 11, 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 July 14, 2014 the undersigned was appointed as the Impartial Hearing Officer.

On July 23, 2014, two days after the statutory deadline, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on July 23, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on August 10, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on August 11, 2014 and will conclude on September 24, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on August 6, 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 August 29, 2014 and that the Due Process Hearing (“DPH”) would be held on September 8 and 9, 2014. The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on August 7, 2014.

On September 4, 2014, the undersigned issued a Supplemental Prehearing Order.

No motions were filed by either party and the DPH was held from 9:20 a.m. to 5:51 p.m. on September 8, 2014 and from 9:33 a.m. to 10:41 a.m. on September 9, 2014 in Room 2003 at the Office of Dispute Resolution, 810 First Street, NE, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, Petitioner’s exhibits P-1 through P-64 were admitted into evidence without objection. Respondent did not introduce any exhibits.

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

- (a) Petitioner;
- (b) Investigator;
- (c) Former Investigator;
- (d) Expert Psychologist, who was admitted by stipulation, after voir dire,
as an expert in psychology and special education evaluation, programming

and placement;

(e) Educational Consultant, who was admitted by stipulation as an expert in special education programming including placement and all other aspects of IEPs, behavior intervention, and development of compensatory education plans; and

(f) Associate Head of School and IEP Coordinator, Non-Public School (“Associate Head”).

No witnesses testified on behalf of Respondent at the DPH.

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 Office of Dispute Resolution 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 a male of Current Age, and attends Current Grade at a public school (the “Attending School”). The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

Petitioner claims that Respondent has denied Student a FAPE by failing to develop and implement appropriate Individualized Education Programs (“IEPs”) for him, as described in more detail in Section IV *infra*.

IV. ISSUES

As confirmed at the PHC and in the PHO, the following issues were presented for determination at the DPH:

(a) Did Respondent deny the Student a FAPE from the beginning of School Year (“SY”) 2012-2013 and continuing because his IEPs (i) lacked Present Levels of Performance (“PLOPs”) and goals tailored to his unique needs, (ii) provided insufficient hours of specialized instruction, (iii) failed to provide all of his instruction in the outside of general education setting, (iv) provided insufficient counseling services, (v) provided insufficient Occupational Therapy (“OT”) services, (vi) failed to provide transportation, (vii) provided insufficient supplementary aids and accommodations, and/or (viii) provided insufficient Extended School Year (“ESY”) services?

(b) Did Respondent deny the Student a FAPE by failing to implement his IEP(s) fully?

V. RELIEF REQUESTED

Petitioner requests the following relief:

(a) an Order that Respondent place and fund the Student’s attendance, with transportation, at Non-Public School² and

(b) compensatory education in the form of placement in a special education day school that serves students with learning disabilities and Attention Deficit Hyperactivity Disorder (“ADHD”), 832 hours of “evidence-based academic interventions” (*i.e.*, tutoring) and 100 hours of OT.

² At the PHC, Petitioner sought placement and funding at three different schools; however, at the DPH, Petitioner pursued only one.

VI. 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).

VII. CREDIBILITY

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

VIII. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a male of Current Age. P-12-1.³
2. At all times relevant to this case, the Student has resided with Petitioner in the District of Columbia. Testimony of Petitioner.
3. The Student has been determined to be eligible for special education and related services under the IDEA, initially as a child with a primary disability classification of Specific Learning Disability (“SLD”) (P-12-1, P-13-1) and subsequently as a child with a primary disability classification of Other Health Impairment (“OHI”) based upon his Attention Deficit Hyperactivity Disorder (“ADHD”) (P-14-1, P-16-1).

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

March 2010 Psychiatric Evaluation

4. On March 3, 2010, Psychiatrist conducted a psychiatric evaluation of the Student, rendered a diagnosis of ADHD, and recommended that the Student receive special education services or that a [Rehabilitation Act of 1973] Section 504 Plan be implemented for him. P-3-4.

March 2011 Student Support Team Referral

5. On March 21, 2011, Petitioner and a “support worker” referred the Student to the Student Support Team (“SST”) because of concerns that he “spent too much time out of class due to numerous suspensions, doctor appointments and various disciplinary consequences this school year.... His behaviors included physical aggression towards peers, running the school halls, defiance, disrespect of authority and issues with transition.” P-10-1.

6. The referral form indicated that the Student had been diagnosed with ADHD but had not been tested for any type of learning disability or emotional disturbance. *Id.*

June 2011 Psychological Evaluation

7. In June 2011, School Psychologist #1 conducted a psychological evaluation of the Student. P-3-3.

8. The Student’s cognitive functioning was found to be in the Borderline range with a Full Scale IQ (“FSIQ”) of 77. *Id.*

9. The Student’s achievement scores fell in the average range. *Id.*

November 2011 Section 504 Eligibility Determination and Plan

10. On November 2, 2011, the Student was found to be eligible for accommodations under Section 504 [of the Rehabilitation Act of 1973] due to ADHD.

P-11-4.

11. The Student's ADHD severely restricted his concentration, learning and working, and substantially restricted his reading and thinking. P-11-3.

12. The Student had been tested for special education but had been found ineligible. P-11-6.

13. A "Section 504 Plan" was developed for the Student. P-11-6 and -7.

November 2011 Discipline

14. On November 29, 2011, the Student received a disciplinary referral for trying to fight two peers, threatening to shoot classmates in the head, and threatening to hit his teacher. P-29-1.

December 2011 Discipline

15. On December 5, 2011, the Student caused a disruption for which he was suspended three days. P-29-2.

16. On December 16, 2011, the Student received a disciplinary referral for grabbing and twisting a peer's arm, and the same day for arguing with two peers, swinging a yardstick at them and refusing to put the yardstick down. P-39-4.

January 2012 Request for Safety Transfer and February 2012 Transfer

17. On January 20, 2012, Petitioner requested a “safety transfer” of the Student from Previous Public School because the Student asserted that he had been raped by an older student. P-47-1.

18. Respondent granted the transfer to Attending School in February 2012. P-5-1.

January 2012 Discipline

19. On January 27, 2012, the Student engaged in fighting for which he was suspended for two days. P-29-5.

April 2012 Speech-Language Evaluation

20. On April 25, 2014, Speech-Language Pathologist #2 conducted a “Comprehensive Speech-Language Evaluation” of the Student, upon referral by Petitioner’s counsel, as an Independent Educational Evaluation (“IEE”) funded by Respondent. P-2-1.

21. Speech-Language Pathologist #2 found that the Student’s overall language abilities were in the average range, but his receptive vocabulary skills were below average and his abilities to comprehend and follow through with language instruction in a classroom were negatively affected by his ADHD diagnosis. P-2-7.

22. Speech-Language Pathologist #2 concluded that the Student “may not qualify for direct speech and language services.” *Id.*

23. Speech-Language Pathologist #2 recommended various supports and classroom accommodations. P-2-8.

April 2012 Occupational Therapy Evaluation

24. On April 25, 2014, Occupational Therapist conducted a “Comprehensive Occupational Therapy Evaluation” of the Student, upon referral by Petitioner’s counsel.⁴ P-1.

25. Occupational Therapist found that the Student had “below average to poor visual perception skills that most likely are contributing in functional ways with reading, writing, math, and organization difficulties.” P-1-9.

26. Occupational Therapist found that the Student displayed some “sensory filtering and registration behaviors that are typical of a child with ADHD, contributing to both distractibility, movement seeking behaviors, self regulation, and difficulty recalling or paying attention to directions (especially multi-step).” *Id.*

27. Occupational Therapist recommended 45 to 60 minutes per week of OT services to improve the Student’s delays in visual perception skills “as these are foundation skills for handwriting, reading, and self-control.” P-1-9 and -10.

28. Occupational Therapist recommended training for self-regulation and sequencing. P-1-9.

29. Occupational Therapist recommended that the Student be instructed with “multi-sensory experiences, incorporating as many different materials and manipulatives as possible, using his body as much as possible, so that he is not relying solely on visual processing to learn information.” *Id.*

⁴ This evaluation was conducted at the same time as, and by the same firm as, the Comprehensive Speech-Language Evaluation. Accordingly, the undersigned infers that it was conducted as an IEE funded by Respondent.

30. Occupational Therapist made a number of other recommendations for classroom accommodations. P-1-10 and -11.

April 2012 Psychological Evaluation

31. On April 20, 2012, Licensed Clinical Psychologist conducted a Psychological Evaluation of the Student, issuing a report dated May 11, 2012 (P-3-1) and signed May 16, 2012 (P-3-10).

32. Licensed Clinical Psychologist observed the Student in the classroom at Attending School, during which the Student was on task most of the time, talked incessantly with a peer for a time, and then separated himself and completed his work. *Id.*

33. Licensed Clinical Psychologist did not witness any physical or verbal aggression during the observation. *Id.*

34. Petitioner informed Licensed Clinical Psychologist that the Student had not demonstrated any behavior problems since his transfer to Attending School. P-3-2.

35. Petitioner, who previously had been reluctant to medicate the Student for ADHD, now strictly adhered to the medication intervention plan and acknowledged the positive and significant impact that psychotropic medication had on the Student. *Id.*

36. The then-current special education coordinator and the Dean of Students at Attending School informed Licensed Clinical Psychologist that the Student did not have any significant behavior problems; he did not require “remarkable” discipline or suspension; he had insight into his emotions and went to the Dean’s office independently to request time and space to collect himself. *Id.*

37. Licensed Clinical Psychologist tested the Student's cognitive abilities and found that his FSIQ was 77 (P-3-4), with significant deficits in his ability to perform tasks requiring visual scanning, short-term memory, and mental processing with graph-motor coordination ("Coding") and weaknesses in attention span, short term auditory memory, and sequencing ability ("Letter Number Sequencing") (P-3-6). The Student's scores on Working Memory (65) and Processing Speed (also 65) were well below his scores on Verbal Comprehension (89) and Perceptual Reasoning (100). P-3-9.

38. On academic testing, the Student's Broad Reading fell in the Very Low range. P-3-7.

39. The Student's Broad Math fell in the Average range. *Id.*

40. The Student's Broad Written Language fell in the Low range, with a score in the Very Low range on the Writing Sample subtest. P-3-8.

41. As for the Student's social-emotional development, based upon Petitioner's report to Licensed Clinical Psychologist, the Student did not display any behaviors requiring immediate attention; however, he demonstrated the potential for developing problems in the following areas: Anger Control, Bullying, Attention, Emotional Self-Control, Executive Functioning, Negative Emotionality, Resiliency and Functional Communication. P-3-8 and -9.

42. Licensed Clinical Psychologist diagnosed the Student with ADHD, Reading Disorder, and Disorder of Written Expression. P-3-10.

43. Licensed Clinical Psychologist recommended intensive academic remediation and support, placement in a smaller school setting that specialized in curricula for

children with learning disabilities, after-school literacy tutoring, extracurricular activities, a male mentor, and continuing medication management by a psychiatrist. P-3-10.

June 2012 Eligibility Determination

44. On June 14, 2012, the Student was found to be eligible for special education and related services as a child with a primary disability classification of SLD. P-12-1.

June 2012 IEP

45. On June 14, 2012, an initial IEP was developed for the Student. P-12-1.

46. The June 14, 2012 IEP stated the Student's PLOPs in Reading and Written Expression by summarizing his results on the Woodcock Johnson III Normative Update Tests of Achievement-Form A, and his results on the Fountas & Pinnell benchmark assessment system. P-12-2 and -3.

47. The June 14, 2012 IEP stated the Student's PLOP in Motor Skills/Physical Development by summarizing the results of the April 2012 Occupational Therapy Evaluation. P-12-4.

48. Given that this was the Student's first IEP, the undersigned finds that these statements of the Student's PLOPs were adequate to form the basis for developing the Student's IEP needs and goals.⁵

⁵ The undersigned discounts the testimony of Educational Consultant that these PLOPs had the same inadequacies as the PLOPs in the Student's May 28, 2014 IEP, because on June 14, 2012 the IEP Team did not have those two intervening years of experience with the Student.

49. The June 14, 2012 IEP stated the Student's needs in Reading as follows:

... Top priority for instructional support is for [the Student] to (1) learn sight words and (2) learn to decode simple grade level cvc [consonant-vowel-consonant] words....

P-12-2.

50. The undersigned finds that these needs were appropriately individualized to the Student's Reading PLOP.

51. The June 14, 2012 IEP stated the Student's goals in Reading as follows:

[The Student] will decode simple cvc words using his knowledge of letter-sound correspondences, as well as words with consonant digraphs and welded sounds, with 80% accuracy in 4 out of 5 trials as measured by his verbal responses and documented in a log.

Id.

52. The undersigned finds that the Student's goals in Reading were appropriately related to his individualized needs.

53. The June 14, 2012 IEP stated the Student's needs in Written Expression as follows:

... Top priority for instructional support is for [the Student] to (1) spell sight words, (2) encode phonetically regular words, (3) write short personal accounts....

P-12-3.

54. Although sight words are not intended to be spelled (Testimony of Educational Consultant), the undersigned finds that the remaining needs were appropriately individualized to the Student's Written Expression PLOP.

55. The June 14, 2012 IEP stated the Student's goals in Written Expression as follows:

Annual Goal 1: When dictated a list of 5 phonetically regular words with 2-5 letters, [the Student] will be able to encode them with 80% accuracy in 4 out of 5 trials as measured by tests.

* * *

Annual Goal 2: When dictated 5 sight words (drawn from the Pre-Primer, Primer, ... and ... Dolch sight word list), [the Student] will be able to spell them with 80% accuracy in 4 out of 5 trials as measured by his test responses and documented with a checklist.

* * *

Annual Goal 3: When prompted with a visual and/or verbal cue, [the Student] will write a short personal account using a minimum of 3 sentences that include evidence of phonetically spelled words and attempts to spell sight words with 80% accuracy as measured by his work samples.

* * *

Annual Goal 4: After reading an appropriate level text and prompted with a visual and/or verbal cue, [the Student] will write a short written response using a minimum of 3-5 sentences that include evidence of phonetically spelled words and attempts to spell sight words with 80% accuracy as measured by his work samples.

P-12-3 and 4.

56. Although sight words are not intended to be spelled (Testimony of Educational Consultant), the undersigned finds that the Student's goals in Written Expression were appropriately related to his individualized needs.

57. The June 14, 2012 IEP stated the Student's needs in Motor Skills/Physical Development as follows: "[The Student] scored below average in visual perception skills." P-12-4.

58. The undersigned finds that this statement of the Student's needs, although general, was sufficient given the reference to the Occupational Therapy Evaluation in the Student's Motor Skills/Physical Development PLOP.

59. The June 14, 2012 IEP stated the Student's goals in Motors Skills/Physical Development as follows:

Annual Goal 1: Given a multi-sensory approach, [the Student] will be able to recall 3-5 items after viewing them for 10 seconds 80% of the time.

* * *

Annual Goal 2: [The Student] will improve self regulating skills as evidenced by his ability to identify his alert state ([for] instance "high, just right, or low") and demonstrate an appropriate response to sensorimotor activity to return to class and participate in a classroom activity for at least 20-30 minutes with minimal cuing 80% of the time.

* * *

Annual Goal 3: Given [a] multi-sensory approach, [the Student] will demonstrate improvement in his visual perceptual skills[,] for instance, will be able to assembled (sic assemble) a 20 pieces (sic piece) puzzle within 30 minutes, identify objects within objects with 100% accuracy.

P-12-4.

60. The undersigned finds that the Student's goals in Motor Skills/Physical Development were appropriately related to his PLOP and individualized needs.

61. The June 14, 2012 IEP prescribed 45 minutes per day of specialized instruction in Reading, and 45 minutes per day of specialized instruction in Written Expression, all in the outside of general education setting. P-12-6.

62. Educational Consultant opined that the Student required an additional 15 minutes per day of specialized instruction each in Reading and Written Expression in the

outside of general education setting, as well as three hours per week of specialized instruction in the general education setting. Testimony of Educational Consultant.

63. The undersigned discounts Educational Consultant's opinions summarized in the preceding paragraph because no specific basis for those opinions was shown and it was reasonable for the IEP Team to start with 45 minutes per day of specialized instruction in each of these areas and observe the Student's progress.

64. Educational Consultant opined that Mathematics should have been an area of concern for the Student, with associated PLOPs, needs and goals. Testimony of Educational Consultant.

65. Based upon the entire record, the undersigned finds that as of June 14, 2012, Mathematics was an area of strength for the Student and it was appropriate for his IEP not to address Mathematics.

66. Educational Consultant opined that the IEP should have included social-emotional goals, based upon the fact that the Student had a Section 504 Plan identifying such needs. Testimony of Educational Consultant.

67. Although the Student had not exhibited behavior problems since his transfer to Attending School (*See*, Findings of Fact 33-36 and 41, *supra*), given his disciplinary history, the undersigned finds that the Student's IEP should have included PLOPs, needs and goals in the area of Emotional, Social and Behavioral Development.

68. Educational Consultant opined that the Student should have received 30 minutes per week of counseling services, as provided in the Section 504 Plan (P-11-6). Testimony of Educational Consultant.

69. The undersigned finds that the Student's June 14, 2012 IEP should have

provided 30 minutes per week of behavioral support services in the form of counseling, the amount he had been receiving under his Section 504 Plan that seemed to be working.⁶

70. The June 14, 2012 IEP prescribed two hours per month of OT in the outside of general education setting. *Id.*

71. Educational Consultant opined that the Student should have received 45 minutes per week of OT, which equates to approximately three hours per month.

72. The undersigned discounts Educational Consultant's opinion summarized in the preceding paragraph because no specific basis for that opinion was shown and it was reasonable for the IEP Team to start with two hours per month of OT and observe the Student's progress.

73. The June 14, 2012 IEP stated that the Student did not require transportation (P-12-8) or ESY services (P-12-10). Petitioner introduced no evidence that the Student required transportation or ESY services at that time.

74. Based upon the entire record, the undersigned finds that the June 14, 2012 IEP, despite some deficiencies, was reasonably calculated to provide the Student educational benefit.

Services Delivered Under the June 2012 IEP

75. Petitioner introduced no evidence that the Student failed to receive specialized instruction pursuant to his June 14, 2012 IEP.

⁶ Respondent's counsel asserted at the DPH—without introducing any evidence—that the Student's Section 504 Plan remained in effect. Educational Consultant testified that a Section 504 Plan becomes "extinct" unless it is renewed annually, and that she was unaware of any renewal of the Student's Section 504 Plan. Regardless of whether the Student continued to have a Section 504 Plan, IDEA requires that a child's IEP address all areas of concern.

76. During September 2012, the Student should have received two hours of OT but he received only 30 minutes (P-26-1)⁷, for a deficit of 90 minutes.

77. During October 2012, the Student should have received two hours of OT but he received none (P-26-2), for a deficit of 120 minutes.

78. During November 2012, the Student should have received two hours of OT but he received only 30 minutes (P-26-3), for a deficit of 90 minutes.

79. During the period from December 1 through 11, 2012, the Student should have received 30 minutes of OT but received none (P-26-4), for a deficit of 30 minutes.

80. Thus, from September through December 11, 2012, the Student received only one hour of OT, when he should have received 6.5 hours, for a deficit of five hours, constituting a deficit of 77 percent of the OT he should have received.

81. The undersigned finds that Respondent's failure to deliver 77 percent of the OT the Student should have received was a material failure to implement that element of his June 14, 2012 IEP.

The Student's Academic Performance From June 14 through December 11, 2012

82. There is no evidence in the record that the Student attended school during the summer of 2012.

⁷ In his cross-examination of witnesses, Respondent's counsel implied, and in his closing argument Respondent's counsel stated, that Respondent's "Service Trackers" do not always reflect services provided, particularly if a scheduled session is not held and it later is made up. There was no evidence introduced that the "Service Trackers" are incomplete. In fact, several "Service Trackers" refer to made-up sessions. Moreover, in the absence of any evidence to the contrary, the undersigned accepts the "Service Trackers" as proof of what services were provided.

83. During the first term of SY 2012-2013, the Student earned a grade of “1” which means “Does Not Meet the Standard (Below Basic)” in English Language Arts; a grade of “3” which means “Meets the Standard (Proficient)” in Mathematics, Science, Music, Health and Physical Education, and World Language; and a grade of “4” which means “Exceeds the Standard (Advanced)” in Social Studies and Art. P-19-1 and 2.

84. During the first term of SY 2012-2013, the Student was “Developing” skills in all academic areas. *Id.*

85. The Student’s reading level at the beginning of SY 2012-2013 was “B” (P-23-1) which was far below his grade level; the goal was level “I.” Testimony of Educational Consultant.

86. By December 11, 2012, the Student’s reading level had increased to “D.”⁸ P-13-2.

The Student’s Behavior and Discipline From June 14 through December 11, 2012

87. During the first term of SY 2012-2013, the Student rarely completed and returned his homework. P-19-2.

88. On November 14, 2012, the Student was deliberately defiant to a teacher and staff in the morning and became more defiant and enraged throughout the afternoon.

⁸ Educational Consultant explained the various reading subtest scores (P-23-1) and opined that the Student had weak phonological awareness, comprehension and decoding skills. Testimony of Educational Consultant. However, as of December 11, 2012, only the beginning-of-year test scores were available. The Student’s skills in these particular areas of reading may well have increased, along with his overall reading level, by December 11, 2012.

P-30-1. Specifically, the Student “made strong allegations to harm staff and students and became a safety risk upon running throughout [the] building and making attempts to exit the building.” *Id.*

89. During the week of November 19, 2012, the Student was suspended for two days, although Petitioner was not notified.⁹ P-48.

90. Educational Consultant opined that a Manifestation Determination Review (“MDR”) should have been conducted before the Student returned to school¹⁰ to determine what had triggered the behavior and to take steps (“interventions”) to prevent a recurrence. Testimony of Educational Consultant.¹¹

91. On December 6, 2012, Former Investigator observed the Student at Attending School, initially in the general education classroom, then in the special education classroom, and then back in the general education classroom. Testimony of Former Investigator.

92. On December 6, 2012, the Student’s general education classroom was an open room with no walls. *Id.*

⁹ There is no evidence in the record explaining how the Student could be suspended for two days without Petitioner being aware. The undersigned therefore infers that it was an in-school suspension.

¹⁰ In the case of an in-school suspension, the “return to school” presumably would mean return to the classroom.

¹¹ Educational Consultant also testified that an MDR should have been conducted after the Student’s October 15, 2013 suspension. On cross-examination, Respondent’s counsel attempted to discredit Educational Consultant by eliciting her testimony that IDEA does not require an MDR unless a child is suspended for more than 10 school days. However, the undersigned understood Educational Consultant’s testimony about the need for MDRs after suspensions to be a statement of best practices, not an interpretation of legal requirements. In any event, alleged failure to conduct an MDR when required is not an issue in the instant case.

93. On December 6, 2012, in the general education classroom, the Student had difficulty putting away his backpack and required a lot of prompting to go to the special education classroom. *Id.*

94. On December 6, 2012, the Student's special education classroom was a very small room with four other students. *Id.*

95. On December 6, 2012 in the special education classroom, (a) the Student needed extra prompting to participate in the opening exercise and song; (b) the Student had difficulty focusing on flash cards with sight words and wandered off from his "station"; (c) the teacher prompted him repeatedly to stay focused, at least every 30 seconds; (d) the Student persisted in opening games on a computer that were different from the sight-word game the teacher had selected for him to play; (e) the teacher repeatedly told the Student to go back to the sight word game; (f) the teacher warned the Student that he would lose his computer time if he did not stay on the sight word game; (g) the Student became upset; and (h) the special education teacher asked the Student to return to the general education classroom, which he did. *Id.*

96. On December 6, 2012, the Student's general education classroom had approximately 21 students with three adults—the general education teacher, an AmeriCorps member, and another adult who was working one-on-one with a different student. *Id.*

97. On December 6, 2012 in the general education classroom, which was noisy, the teacher repeatedly instructed the Student to get a book at his level (which was "C") from the bookshelf, and he repeatedly got books at a lower level ("A"); then he got up and walked out of the classroom. *Id.*

98. Eight minutes after the Student walked out of the classroom, the special education teacher came to the general education classroom looking for him, was informed he was not there, and called the office to say that the Student had left the room. *Id.*

99. Seven minutes after that, Former Investigator left the classroom, went to the front desk, and was informed that the Student had been found and sent back to the classroom. *Id.*

100. Respondent did not inform Petitioner of this incident. P-50-2.

101. On December 11, 2012, the Student was in possession of a weapon at school. P-31-1. Specifically, the Student used scissors as a weapon and made verbal threats against his teacher and peers. P-6-5.

102. An MDR was conducted. P-31-1.

103. At the MDR, a staff member at Attending School discussed another incident when the Student ran around the school for over an hour and a half, and the Student's general education teacher stated that during that incident the Student had been cursing and using bad language and that she had seen similar behavior the previous year. Testimony of Former Investigator.

104. At the MDR, it was concluded that the December 11, 2012 conduct was caused by, or had a direct and substantial relationship to the Student's disability. P-31-1.

105. The Student was suspended for eight days for his conduct on

December 11, 2012.¹² P-4-6.

106. A crisis intervention plan and a Functional Behavioral Assessment (“FBA”) were to be conducted, but not immediately. Testimony of Former Investigator.

107. Petitioner and her counsel expressed concern and wanted the crisis intervention plan and FBA to be completed before the Student’s return from suspension but Respondent’s representative stated that she “couldn’t” but would make note of Petitioner’s concerns. *Id.*

December 2012 IEP

108. The Student’s IEP was revised on December 12, 2012. P-13-1.

109. The December 12, 2012 IEP stated the Student’s PLOP in Reading, based upon his most recent interim assessment (A-NET) and the Fountas & Pinnell benchmark assessment system, as follows:

According to [his] most recent interim assessment (A-NET), [the Student] scored an overall of 25% accuracy in ELA [English Language Arts]. [He] scored 100% in determining academic vocabulary and domain specific word meanings and 100% in identifying connections in nonfiction texts. [He] scored 0% in answering questions about key details, 0% in determining the topic of longer text and isolated paragraphs, and 20% in correctly using collective nouns, irregular nouns, verbs, and description. [The Student] is reading at an independent level D, and instructional level E as measured by the Fountas & Pinnell benchmark assessment system. The expectation is for students to read at a level M by the end of [the] grade.

P-13-2.

¹² Respondent’s counsel elicited testimony from Former Investigator that because the MDR found the Student’s behavior to be a manifestation of his disability, he was not “disciplined.” However, he still was out of school for those days (Testimony of Former Investigator), missing instruction.

110. The undersigned finds the Student's Reading PLOP to be sufficiently detailed to form the basis for revising the Student's IEP needs and goals.

111. The December 12, 2012 IEP stated the Student's needs in Reading as follows:

... Top priority for instructional support is for [the Student] to (1) learn sight words (2) learn to decode simple grade level cvc words (3) determine main idea/topic of texts....

P-13-2. The first two of these were unchanged from the June 2012 IEP; the third was new.

112. The undersigned finds that these needs were appropriately individualized to the Student's Reading PLOP.

113. The December 12, 2012 IEP stated the Student's goals in Reading as follows:

Annual Goal 1: [The Student] will decode simple cvc words using his knowledge of letter-sound correspondences, as well as words with consonant digraphs and welded sounds, with 80% accuracy in 4 out of 5 trials as measured by his verbal responses and documented in a log.

* * *

Annual Goal 2: Every month [the Student] will learn 10-15 new high frequency words (drawn from the Pre-Primer, Primer ... and ... Dolch sight word list), with 80% accuracy in 4 out of 5 trials as measured by his verbal responses that are documented by a checklist.

* * *

Annual Goal 3: [The Student] will determine the topic/main idea of a "just right" level text and answer questions about key details with 80% accuracy, 4 out of 5 trials.

P-13-2 and -3. The first goal was unchanged from the June 2012 IEP; the second and third goals were new.

114. Educational Consultant opined that the Student should have had a reading goal related to fluency. Testimony of Educational Consultant.

115. In view of the fact that middle-of-year reading testing had not yet occurred, the undersigned finds that the lack of a reading fluency goal in the December 12, 2012 IEP was not inappropriate.

116. Given the progress the Student had made in Reading since the beginning of SY 2012-2013, the undersigned finds that the Student's goals in Reading were, overall, appropriately related to his individualized needs.

117. The December 12, 2012 IEP stated the Student's PLOP in Written Expression as follows:

[The Student] has a weakness in his writing ability. [He] struggles with his quality of writing and writing stamina. [He] is reluctant to write opinion pieces that require statement of topic and three supporting details. [The Student] struggles to spell grade level sight words and irregularly spelled words. When [he] encounters a word he is not able to spell, he usually gives up and refuses to complete written assignments.

P-13-3.

118. The undersigned finds that the Student's Written Expression PLOP was inadequate because it did not provide any *measurements* of his writing ability, which Respondent had the opportunity to provide based upon Attending School's experience with the Student; accordingly, the PLOP did not provide a sufficient basis for the IEP Team to develop the Student's Written Expression needs and goals.

119. The December 12, 2012 IEP stated the Student's needs in Written Expression as follows:

... Top priority for instructional support is for [the Student] to (1) spell sight words, (2) encode phonetically regular words, (3) write short personal accounts....

P-13-3. This was unchanged from the June 2012 IEP.

120. Because the Student's Written Expression PLOP was inadequate, the undersigned finds that this statement of the Student's Written Expression needs was not appropriately individualized.

121. The December 12, 2012 IEP stated the Student's goals in Written Expression as follows:

Annual Goal 1: When dictated a list of 5 phonetically regular words with 2-5 letters, [the Student] will be able to encode them with 80% accuracy in 4 out of 5 trials as measured by tests.

* * *

Annual Goal 2: When dictated 5 sight words (drawn from the Pre-Primer, Primer, ... and ... Dolch sight word list), [the Student] will be able to spell them with 80% accuracy in 4 out of 5 trials as measured by his test responses and documented with a checklist.

* * *

Annual Goal 3: When prompted with a visual and/or verbal cue, [the Student] will write a short personal account using a minimum of 3 sentences that include evidence of phonetically spelled words and attempts to spell sight words with 80% accuracy as measured by his work samples.

* * *

Annual Goal 4: After reading an appropriate level text and prompted with a visual and/or verbal cue, [the Student] will write a short written response using a minimum of 3-5 sentences that include evidence of phonetically spelled words and attempts to spell sight words with 80% accuracy as measured by his work samples.

P-13-4 and -5. These goals were unchanged from the June 2012 IEP.

122. Because the Student's Written Expression PLOP and needs were inadequate, the resulting goals were inappropriate; moreover, repeating the same Written Expression

needs and goals from IEP to IEP indicates the Student failed to make progress in this area.

123. The December 12, 2012 IEP did not include Mathematics as an area of concern, despite the fact that the Student continued to make no progress in Mathematics. Stipulation of Counsel at the DPH.

124. The undersigned finds that the failure to include Mathematics as an area of concern, and to include PLOPs, needs and goals in that area, was inappropriate and not reasonably calculated to provide educational benefit to the Student in Mathematics.

125. The December 12, 2012 IEP stated the Student's PLOP in Motor Skills/Physical Development as follows:

... [The Student] utilizes a modified tripod grasp, wrapping his thumb around the pencil. [He] does not appear to have challenges with sensory processing; however, some sensory filtering and registration behaviors are present. He follows simple directions consistently in treatment sessions.

P-13-5.

126. The undersigned finds that, given months of experience with the Student at Attending School, Respondent should have been able to provide some *measurements* of the Student's motor skills and physical development; the general wording of the PLOP was inadequate to form the basis for revising the Student's Motor Skills/Physical Development needs and goals.

127. The December 12, 2012 IEP stated the Student's needs in Motor Skills/Physical Development as follows: "[The Student] presents with deficits in visual perception skills." P-13-5.

128. The undersigned finds this statement of the Student's needs, based upon a deficient PLOP, to be overly general to provide a basis for the IEP Team to develop the Student's goals in this area.

129. The December 12, 2012 IEP stated the Student's goals in Motor Skills/Physical Development as follows:

Annual Goal 1: Given a multi-sensory approach, [the Student] will be able to recall 3-5 items after viewing them for 10 seconds 80% of the time.

* * *

Annual Goal 2: [The Student] will improve self regulating skills as evidenced by his ability to identify his alert state ([for] instance "high, just right, or low") and demonstrate an appropriate response to sensorimotor activity to return to class and participate in a classroom activity for at least 20-30 minutes with minimal cuing 80% of the time.

* * *

Annual Goal 3: Given [a] multi-sensory approach, [the Student] will demonstrate improvement in his visual perceptual skills[,] for instance, will be able to assembled (sic assemble) a 20 pieces (sic piece) puzzle within 30 minutes, identify objects within objects with 100% accuracy.

P-13-5 and -6. These goals were unchanged from the June 2012 IEP.

130. The undersigned finds that the Student's goals in Motor Skills/Physical Development were inappropriate because they were based upon deficient statements of his PLOP and needs; moreover, repetition of the same Motor Skills/Physical Development needs and goals from IEP to IEP indicates that the Student failed to make progress in this area.

131. The December 12, 2012 IEP prescribed one hour per day of specialized instruction in Reading, and one hour per day of specialized instruction in Written

Expression, both in the outside of general education setting. P-13-7. This was an increase of 15 minutes per day in each subject from the services prescribed in the June 2012 IEP.

132. Educational Consultant “would have probably increased the hours in reading” based upon new assessments. Testimony of Educational Consultant.

133. The undersigned rejects Educational Consultant’s vague recommendation summarized in the preceding paragraph because there were no new assessments as of December 12, 2012 indicating the Student’s progress in Reading since the beginning of SY 2012-2013.

134. Because the PLOPs, needs and goals in Written Expression were inadequate (*see*, Findings of Fact 118-122), there was no basis for the IEP Team to determine the appropriate hours of specialized instruction in Written Expression.

135. Petitioner and her counsel stated that the Student needed a full-time special education program in a smaller setting, but Respondent’s representatives stated that the meeting was not about “placement,” and that they wanted to follow “DCPS procedures” before placement could be discussed. Testimony of Former Investigator.

136. The December 12, 2012 IEP continued the two hours per month of OT in the outside of general education setting as prescribed in the June 2012 IEP, and added an hour per month of OT in the general education setting. *Id.*

137. Based upon the inadequate Motor Skills/Physical Development PLOP, needs and goals (*See*, Findings of Fact 126-130), there was no basis for the IEP Team to determine the appropriate hours of OT.

138. The Student’s behavior and suspension were discussed at the December 12, 2012 meeting. Testimony of Former Investigator.

139. The Student's general education teacher, who also had taught him the previous year, stated that the Student had aggression and off-task behaviors the previous year and that his current behaviors were "nothing new." *Id.*

140. Petitioner's representatives requested social-emotional goals in the IEP, but Respondent's representatives stated that they did not want to add any more goals because they did not want to reduce the Student's time in the classroom [that would result from the provision of additional related services]. Testimony of Former Investigator.

141. The December 12, 2012 IEP did not include Emotional, Social and Behavioral Development as an area of concern. P-13.

142. The undersigned finds that, particularly in view of the Student's suspensions, his IEP should have included this as an area of concern, with PLOPs, needs and goals.

143. The undersigned finds that as of December 12, 2012, the Student required at least 30 minutes per week of behavior support services in the form of individual counseling, as well as a Behavior Intervention Plan ("BIP").

144. The December 12, 2012 IEP stated that the Student did not require transportation or ESY services. P-13-10.

145. On December 13, 2012, Petitioner, through counsel, requested transportation for the Student "because of his ADHD, so that he will not experience so much stress and stimulation in the mornings on public transit and will have a more settled morning transition into school." P-49-2.

146. Apparently Respondent agreed that the Student's disability required him to have transportation, because Respondent took steps to add transportation to the Student's IEP. P-49-1.

147. However, Respondent subsequently refused the request for transportation on the grounds that Attending School was not the Student’s neighborhood school, his “zone” school was capable of implementing his IEP, he had not been assigned to Attending School through the Least Restrictive Environment (“LRE”) process, and he had been “parentally placed” at Attending School. *Id.*

148. The undersigned finds that Respondent was incorrect in its assertion that the Student was “parentally placed” at Attending School; rather, the Student was assigned to Attending School as a result of a safety transfer (*See*, Finding of Fact 18, *supra*) and there is no evidence in the record that Petitioner selected Attending School.

149. The undersigned finds that the Student required transportation as of December 13, 2012 and that the lack of transportation contributed to his behavior problems.

150. Based upon the entire record—particularly the failure to address the Student’s social, emotional and behavioral problems—the undersigned finds that the December 12, 2012 IEP had substantial deficiencies and was not reasonably calculated to provide educational benefit to the Student.

Services Delivered Under the December 2012 IEP

151. Petitioner introduced no evidence that the Student failed to receive specialized instruction pursuant to his IEP.

152. During the period from December 12 through 31, 2012, the Student should have received one hour of OT (after allowing for the school closure for the winter break), but he received none (P-26-4), for a deficit of an hour.

153. During January 2013, the Student should have received three hours of OT but he received only 2.5 hours (P-26-5), for a deficit of 30 minutes.

154. From February 1 through 13, 2013, the Student should have received two hours of OT and he received two hours. P-26-7.

155. The undersigned finds that the failure to receive 30 minutes out of 5 hours of OT, a ten percent shortfall, was not a material failure to implement that aspect of the Student's December 12, 2012 IEP.

The Student's Academic Performance From December 12, 2012 through February 13, 2013

156. During the second term of SY 2012-2013, the Student's grades remained the same as during the first term and his skills in all academic areas continued to be "Developing." P-19-1 and 2.

157. During the second term of SY 2012-2013, the Student showed some growth in Reading, having advanced one level (from level "C" to level "D"). P-19-3.

158. During the second term of SY 2012-2013, the Student demonstrated more success when given manipulatives and a quiet isolated area to work. *Id.*

The Student's Behavior and Discipline From December 12, 2012 through February 13, 2013

159. During the second term of SY 2012-2013, the Student rarely completed and returned his homework and behavior sheet. P-19-2 and -3.

160. During the second term of SY 2012-2013, the Student's work habits declined; his behavior often impeded his ability to complete assignments and he was not always receptive to help. P-19-3.

January 2013 Psychological Evaluation

161. On January 25, 2013, School Psychologist #2 issued a Psychological Evaluation of the Student. P-4-1.

162. The Student's teacher informed School Psychologist #2 that the Student exhibited increased noncompliance, impulsivity, distractibility, and aggressive behaviors in the classroom, and that she was concerned about his safety and the safety of others in the classroom. *Id.*

163. School Psychologist #2 concluded that the Student needed behavior support services to address aggression, impulsivity, personal safety, and compliance with classroom, school and district policies. *Id.*

164. School Psychologist #2 recommended that the Student's primary disability category be changed from SLD to OHI. *Id.*

January 2013 Observations and Functional Behavioral Assessment

165. During a 20-minute observation on January 15, 2013, the Student was actively engaged and focused, was able to answer questions on command, and was able acceptably to relate to peers. P-5-4.

166. During an observation on January 16, 2013, the Student distracted others physically and verbally, was on task only intermittently, struggled with focus and

attention, and was fidgety, although he responded when called upon and was able to complete his work with normal effort and within a normal time frame. P-5-4 and -5.

167. During an observation on January 23, 2013, the Student was aggressive, distracted others physically and verbally, was controlling of others (pretending to be the teacher), was fidgety, did not follow teacher directions, did not respond upon questioning, was off-task most of the time, and was removed from the classroom by the Dean. P-5-5.

168. Sometime after January 23, 2013, an undated FBA of the Student was conducted. P-5-1.

169. The Student's behaviors of concern were defiance, bossiness, noncompliance, verbal aggression, bullying and attention seeking. P-5-3.

170. The behaviors of concern occurred in all school settings throughout the day, and once started, would last until the end of the school day. *Id.*

171. At least twice per week since October 2012, the Student's behavior had caused him to be removed from the classroom. *Id.*

172. The Student's behaviors usually resulted in him receiving attention from adults or peers in the form of individual redirection or removal from the classroom to the school detention area. *Id.*

173. It was determined that the Student's behavior might be related to skill deficits in social skills and coping skills, or a symptom of poor emotional regulation skills. *Id.*

174. The Student's negative behaviors appeared to follow situations where there was a real or perceived struggle over power and control; when he felt threatened or felt that someone was forcing him to do something he did not want to do, he reacted by

verbal and/or physical threats or other acts of intimidation to regain his feeling of power and control over the interaction. P-5-5.

175. The FBA recommended individual therapy services and a BIP to assist the Student in gaining skills in the areas of emotional regulation and self awareness, and to identify ways to self soothe without needing to exert power over others. P-5-6.

February 2013 Behavior Intervention Plan

176. On February 13, 2013, a BIP was developed for the Student. P-15-1.

177. The BIP provided that, at the request of the Student or teachers, the Student would be provided a “take a break choice deck,” and would be coached in calming and self soothing techniques until he was able to execute them effectively independently. *Id.*

178. The BIP also provided that the Student would be given leadership roles and tasks to carry out in the school setting as a reward for positive and regulated behaviors. *Id.*

179. In the event the Student presented defiant and escalating behaviors and refused to taking a break and self soothing strategies, the BIP provided that he should immediately be removed from the classroom. *Id.*

February 2013 Reevaluation

180. On February 13, 2014, Respondent prepared an Evaluation Summary Report. P-6.

181. The Student’s teachers and related service providers had noticed more aggressive, defiant and oppositional behaviors. *Id.*

February 2013 IEP

182. The Student's IEP was revised on February 14, 2013. P-13-1.

183. His primary disability classification was changed to OHI. *Id.*

184. The Student's PLOPs, needs and goals in Reading, Written Expression, and Motor Skills/Physical Development were unchanged from the December 2012 IEP. P-14-2 through -7.

185. Thus, the deficiencies in the PLOPs, needs and goals in Written Expression and Motor Skills/Physical Development (*See*, Findings of Fact 118-122 and 126-130, respectively) persisted.

186. The February 14, 2013 IEP continued to omit Mathematics as an area of concern.

187. Educational Consultant opined that the Student's PLOPs in all academic areas should have been modified to address his ADHD, as that now was agreed to be his primary disability and it was a barrier to his learning in all academic areas. Testimony of Educational Consultant.

188. Petitioner introduced no evidence contradicting Educational Consultant's opinion summarized in the preceding paragraph.

189. Educational Consultant opined that as of February 14, 2013, the Student required that all of his instruction be provided in the outside of general education setting, although he could have continued to have lunch and recess with his non-disabled peers. Testimony of Educational Consultant.

190. Based upon the entire record, and particularly the fact that the Student continued to perform two grade levels below Current Grade, the undersigned agrees with Educational Consultant's opinion summarized in the preceding paragraph.

191. The February 14, 2013 IEP added Emotional, Social and Behavioral Development as an area of concern. P-14-5.

192. The February 14, 2013 IEP stated the Student's PLOP in Emotional, Social and Behavioral Development as follows:

[The Student] is observed as a student with friends in his school setting. [He] is able to play among his peers at recess and other unstructured times throughout the day. It is reported by the teacher that [the Student] experiences episodes of extreme defiance and difficulty interacting with his peer[s] in the classroom setting. These periods are marked by defiance, aggressive gestures, and verbal assaults to both teachers and students. [The Student] also demonstrates periods of time where he is emotionally regulated and able to successfully navigate his classroom environment. It is unknown what prompts the shift in his behavior at this time. A clear antecedent to [the Student's] behavior is difficult to identify at this time. At times, he is able to function effectively in the classroom and navigate both the social and emotional environments with success. It appears that on days when [the Student] has difficulty these negative behaviors follow situations where there is a real or perceived struggle over power and control involving [the Student]. When [he] feels threatened or feels that someone is forcing him to do something he does not want to do at that time, he reacts by verbal and/or physical threats or other acts of intimidation, to regain his feeling of power and control over the interaction.

Id.

193. The undersigned finds that the PLOP in the preceding paragraph lacked specificity, which the IEP Team could have included based upon the recent assessments.

194. The February 14, 2013 IEP stated the Student's emotional, social and behavioral development needs as follows:

[The Student] needs to work on improving his anger management skills when coping with negative feelings. In addition, he needs to increase his frustration tolerance when involving both adults and peers. The intended priority for [the Student] is to gain self-control in order to enable him to successfully access grade level content, while developing positive peer relationship skills. Behavioral Support Counseling will be provided to improve social emotional functioning specifically in the areas of self control and self calming skills.

Id.

195. The undersigned finds that these emotional, social and behavioral development needs were overly general and vague.

196. The February 14, 2013 IEP stated the emotional, social and behavioral development goals as follows:

Annual Goal 1: [The Student] will be able to utilize self soothing and calming techniques learned through individual therapy sessions when confronted with a challenging circumstance while in the school setting in 4 out of 5 attempts.

* * *

Annual Goal 2: Through behavioral support services, the student will gain feeling and body awareness in order to employ calming techniques prior to becoming explosive, as evidenced by an 80% decrease in explosive episodes as documented by the classroom color coded behavior system.

P-14-6.

197. The undersigned finds that Emotional, Social and Behavioral Development Goal #1 was appropriately related to the Student's individualized needs.

198. However, Goal #2 was defective because the February 14, 2013 IEP nowhere defined or quantified the Student's "explosive episodes" so there was no baseline from which to measure progress and no way to know what to count as an "explosive episode" prospectively.

199. The February 14, 2013 IEP continued the specialized instruction and OT prescribed in the December 2012 IEP and added two hours per month of behavioral support services in the outside of general education setting. P-14-8.

200. This is the same amount of behavioral support services that had been provided under the Section 504 Plan in November 2011. P-11-6.

201. The undersigned finds that, in view of the Student's increasing behavioral problems, he required more than two hours of behavioral support services.

202. Educational Consultant recommended the same additions to accommodations as she recommended with regard to the prior IEPs, as well as new technology. Testimony of Educational Consultant.

203. The undersigned does not find the differences between the accommodations provided in the February 14, 2013 IEP and the accommodations recommended by Educational Consultant to be material.

204. The February 14, 2013 IEP stated that the Student did not require transportation and that his need for ESY services was not yet determined. P-14-11.

205. The Student required transportation. *See*, Findings of Fact 149, *supra*.

206. The undersigned finds that, for the same reasons that the December 12, 2012 IEP was not reasonably calculated to provide the Student educational benefit, and because Emotional, Social and Behavioral Development Goal #2 was defective, the

February 14, 2013 IEP was not reasonably calculated to provide the Student educational benefit, even though some elements—the provisions related to Reading, and Emotional, Social and Behavioral Development Goal #1—were adequate.

March 2013 Observation by Educational Consultant

207. On March 21, 2013, Educational Consultant observed the Student in a general education classroom and in a self-contained setting. P-7-1.

208. Educational Consultant did not observe any accommodations provided to the Student in the general education classroom; based upon her experience with Students with ADHD, she would have expected a visual schedule, a behavior chart with a “token economy,” preferential seating, hand-over-hand instruction, and visual and verbal prompts. Testimony of Educational Consultant.

209. In the general education classroom, the Student raised his hand once to participate, was angered when a peer took items from his desk, but was easily redirected back to the group after becoming angry. P-7-2.

210. The Student was distracted by the noise and movement in the general education classroom and by several peers’ interfering behaviors. *Id.*

211. In the general education classroom the Student did not consistently identify short or long vowel sounds and was unable to discriminate between two short vowel sounds. *Id.*

212. The Student had a difficult time opening and closing a bag containing manipulatives and his handwriting was illegible. *Id.*

213. In the self-contained classroom, Educational Consultant observed that the Student received the following accommodations, which were effective: close adult proximity, repetition of directions, and frequent verbal praise. Testimony of Educational Consultant.

214. In the self-contained classroom, the Student wrote all of his sight words the first time he was asked, responded well to teacher modeling of the expected task, worked independently, completed all assigned tasks, raised his hand to participate frequently, was engaged, self-monitored, and used picture cues to help with his reading decoding and comprehension. P-7-1 and -2.

215. Educational Consultant spoke with the Student's general education teacher who stated that the Student was not making academic progress. Testimony of Educational Consultant.

216. Educational Consultant recommended that the Student receive all of his academic instruction in a self-contained classroom (*i.e.*, outside of general education) but that he should be with general education (*i.e.*, non-disabled) peers for lunch, recess, and "specials." P-7-2.

217. Educational Consultant recommended that the Student receive, *inter alia*, multi-sensory instruction in all content areas and an "evidence-based phonological sequential approach" to reading. *Id.*

Services Delivered Under the February 2013 IEP

218. Petitioner introduced no evidence that the Student failed to receive specialized instruction pursuant to his IEP.

219. Having received two hours of OT during the first half of February, 2013, the Student should have received one hour of OT from February 14 through 28, 2013, and he received that hour. P-26-7.

220. During March 2013, the Student should have received three hours of OT and he received three hours and fifteen minutes (P-26-10), for a surplus of 15 minutes.

221. During April 2013, the Student should have received three hours of OT but he received only two hours (P-26-12 and -13), for a deficit of one hour (albeit attributable to spring break).

222. During May 2013, the Student should have received, and did receive, three hours of OT. P-26-14 and -15.

223. From June 1 through 18, 2013, the Student should have received two hours of OT but he received only one hour (P-26-16), for a deficit of one hour.

224. Thus, from February 14 through June 18, 2013, the Student received 10 hours and 15 minutes of OT, when he should have received 12 hours, for a deficit of 1.75 hours, constituting a deficit of 15 percent of the OT he should have received. Adjusting one hour for the session missed during spring break, the deficit was .75 hour, or six percent of the OT the Student should have received.

225. The undersigned finds that Respondent's failure to deliver six to 15 percent of the OT the Student should have received was not a material failure to implement that element of his February 14, 2014 IEP.

226. From February 14 through 28, 2013, the Student should have received one hour of behavioral support services and he received 90 minutes (P-28-1), a surplus of 30 minutes.

227. During March 2013, the Student should have received two hours of behavioral support services and he received two hours and 55 minutes (P-28-2 and -3), a surplus of 55 minutes.

228. During April 2013, the Student should have received two hours of behavioral support services and he received 75 minutes (P-28-4), a deficit of 45 minutes (albeit attributable to spring break).

229. During May 2013, the Student should have received and did receive two hours of behavioral support services. P-28-6.

230. From June 1 through 11, 2013, the Student should have received one hour of behavioral support services. There is no evidence that he received any such services, for a deficit of one hour.

231. Thus, from February 14 through June 18, 2013, the Student received seven hours and 10 minutes of behavioral support services, when he should have received eight hours, for a deficit of 50 minutes, constituting a deficit of 10 percent of the behavioral support services he should have received. Adjusting an hour for services missed during spring break, the Student received 10 minutes more of behavioral support services than required.

232. Without adjusting for spring break, the undersigned finds that Respondent's failure to deliver 10 percent of the behavioral support services the Student should have received—the equivalent of less than one session—was not a material failure to implement that element of his February 14, 2014 IEP.

The Student's Academic Performance From February 14 through June 18, 2013

233. During the third and fourth terms of SY 2012-2013, the Student's grades remained the same as during the first and second terms, with the following exceptions: (a) his grade in English Language Arts rose in the third term to "2" which means "Approaches the Standard (Basic)" before falling back to "1" in the fourth term, (b) his grades in Mathematics and Music fell to "2" in the third and fourth terms, and (c) his grade in Health and Physical Education rose to "4" in the fourth term. P-19-1 and 2.

234. During the third and fourth terms of SY 2012-2013, the Student's skills in all academic areas continued to be "Developing." *Id.*

235. During the third term of SY 2012-2013, the Student advanced in Reading, increasing one level (from "D" to "E"), although he continued to need extensive support when reading. P-19-3.

236. During the fourth term of SY 2012-2013, the Student advanced in Reading, increasing two levels (from "E" to "G"). *Id.*

The Student's Behavior and Discipline From February 14 through June 18, 2013

237. On March 7, 2013, the Student engaged in bouncing a basketball in class, failed to follow the teacher's instruction to stop, and ran to the restroom and bounced the ball against the wall. P-32-1. The teacher retrieved the ball when it rolled out of the restroom, after which the Student pushed the teacher in an attempt to retrieve the ball. *Id.*

238. An MDR was conducted and it was concluded that the Student's March 7, 2013 conduct was caused by, or had a direct and substantial relationship to the Student's disability. P-32-3.

239. On May 2, 2013, the Student and five peers attacked and hit a classmate repeatedly, injuring him, for which the Student was suspended for six days. P-33-1.

240. An MDR was conducted and it was concluded that the Student's May 2, 2013 conduct was caused by, or had a direct and substantial relationship to the Student's disability. P-33-2.

241. On May 28, 2013, the Student lit matches in his desk and forcefully struck a peer, for which he was suspended for three days. P-34-1.

242. There is no evidence in the record as to whether an MDR was conducted.

243. During the third term of SY 2012-2013, the Student rarely completed and returned his homework, and he needed more (*i.e.* frequent) prompting to follow classroom rules, listen while others spoke, and practice self-control. P-19-2.

244. During the fourth term of SY 2012-2013, the Student (a) rarely completed and returned his homework; (b) needed more (*i.e.* frequent) prompting to follow directions, follow playground rules/school rules, and respect the rights/property of others; (c) continued to need frequent prompting to follow classroom rules and practice self-control; and (d) needed less (*i.e.*, limited) prompting to listen while others spoke. P-19-2.

June 2013 IEP

245. The Student's IEP was revised on June 19, 2013. P-16-2.

246. The Student's PLOPs in Reading and Written Expression were revised from the February 2013 IEP to reflect that he was reading at an independent level "F" (up from "D") and instructional level "G" (up from "E"), and that

[he] now is able to read and recognize 35/40 (87%) of the PrePrimer, 32/52 (61%) Primer, 20/41 (48%) of the [previous grade] and 9/46 of the

[Current Grade] Dolch sight word lists. This is a huge amount of growth from the beginning of the year when he was only able to read and recognize 40% of the Preprimer Dolch sight words.

* * *

With his ability to read these words, he is able to spell some of these words as well.

P-16-3 and -4.

247. However, Respondent did not revise the Student's PLOP in Reading to describe the Student's present levels in "decoding, literal comprehension, inferential comprehension, and fluency." P-50-2.

248. The undersigned finds that the Student's Reading PLOP, addressing only his ability to read and recognize words, was insufficient basis to determine his Reading needs and goals.

249. The June 19, 2013 IEP added the following to the Student's needs in Reading: to learn to decode irregularly spelled words. P-16-3.

250. The undersigned finds that although the Student's Reading needs remained appropriately individualized to the Student's stated Reading PLOP, because the PLOP itself was incomplete, the Reading needs similarly were incomplete.

251. The June 19, 2013 IEP reworded the Student's goals in Reading, *e.g.*, to clarify the source of informal assessment words. P-16-3 and -4.

252. However, the Student's Reading goals did not address inferential comprehension, as Petitioner had requested. P-50-2 and -3.

253. The undersigned finds that the Student's Reading goals were incomplete due to the incomplete nature of his Reading PLOP and Reading needs, especially the lack of any goal related to inferential comprehension.

254. The Student's PLOP in Written Expression was updated to read as follows:

... [The Student] has a weakness in his writing ability. [He] struggles with his quality of writing and writing stamina. [The Student] is reluctant to write opinion pieces that require statement of topic and three supporting details. [He] struggles to spell grade level sight words and irregularly spelled words. [He] is now able to read and recognize 35/40 (87%) of the PrePrimer, 32/52 (61%) Primer, 20/41 (48%) of the [previous grade] and 9/46 of the [Current Grade] Dolch sight word lists. This is a huge amount of growth from the beginning of the year when he was only able to read and recognize 40% of the Preprimer Dolch sight words. With his ability to read these words, he is able to spell some of these words as well. When [the Student] encounters a word he is not able to spell, he usually gives up and refuses to complete writing assignments. [The Student] does not use inventive spelling within his writing, unless prompted by the teacher.

P-16-4.

255. At the IEP Team meeting, Petitioner asserted that this Written Expression PLOP was inadequate because it focused on what the Student could read, not what he could spell, and contained no information about his writing grade-level, syntax, punctuation, or the quantity of his written output. P-50-3.

256. The undersigned finds that the Student's Written Expression PLOP was inadequate because it did not provide any *measurements* of his writing ability. Accordingly, the PLOP did not provide a sufficient basis for the IEP Team to develop the Student's Written Expression needs and goals.

257. The statement of the Student's needs in Written Expression remained the same as in the February 14, 2013 IEP. P-16-5.

258. The undersigned finds that these Written Expression needs were deficient because they were based upon a deficient PLOP.

259. The Student's Written Expression goals were reworded slightly, but the content remained the same. P-16-6.

260. Because the Written Expression goals were based upon deficient PLOP and needs, the undersigned finds that the Written Expression goals likewise were deficient; moreover, the fact that the Student's goals remained substantially the same indicates that he made no progress in Written Expression since the February 14, 2013 IEP.

261. The Student's PLOP in Motor Skills/Physical Development was updated to reflect his demonstrated improvement with his sensory processing skills and visual perceptual skills, and that he now copied simple words from the blackboard and worksheet with appropriate spacing of letters and words, orientation of lines, and size alignment of letters. P-16-8.

262. The June 19, 2013 IEP did not address the Student's poor organization and planning, a concern raised by Petitioner (P-50-3), which the undersigned finds should have been included in the Student's Motor Skills/Physical Development PLOP, needs and goals.

263. The Student's Motor Skills/Physical Development needs were revised to the following: "[The Student] presents with deficits in visual perceptual skills and sensory processing skills." P-16-8.

264. Given the Student's improved abilities in some aspects of motor skills and physical development, and continuing deficits in others, the undersigned finds that this statement of needs was overly general and failed to provide the IEP Team with a basis for developing the Student's Motor Skills/Physical Development goals.

265. The Student's goals in the area of Motor Skills/Physical Development remained the same as in the February 14, 2013 IEP. The undersigned finds that

Respondent's repetition of the same goals from IEP to IEP despite changes in the Student's PLOP was not appropriate.

266. The Student's PLOP in Emotional, Social and Behavioral Development was updated to reflect the frequency and setting of the Student's behaviors of concern.

P-16-7.

267. The Student's PLOP in Emotional, Social and Behavioral Development did not address his failure to complete tasks or the time he spent off-task when he should have been doing classwork, concerns raised by Petitioner. P-50-3.

268. The undersigned finds that the Student's PLOP in this area was deficient because it did not address the Student's chronic failure to attend to classwork and to complete assignments, which was a behavioral issue.

269. The Student's needs in the area of Emotional, Social and Behavioral Development remained the same as in the February 14, 2013 IEP (P-16-7), which the undersigned finds to be inappropriate given the increasing frequency and severity of his behaviors.

270. The Student's emotional, social and behavioral development goals were slightly reworded from the February 14, 2013 IEP (P-16-7 and -8) but remained substantively the same, which the undersigned finds to be inappropriate given the increasing frequency and severity of his behaviors.

271. Petitioner asserted that Goal #2 ("Through behavioral support services, the student will gain feeling and body awareness in order to employ calming techniques prior to becoming explosive, as evidenced by an 80% decrease in explosive episodes as documented by the classroom behavior tracking system") (P-16-8) was inadequate

because Respondent had not collected “adequate data regarding incidents of aggression and defiance” to provide a baseline from which to measure the 80% decrease. P-50-3.

272. While the Student’s Emotional, Social and Behavioral Development PLOP does state that behavior incidents occurred on average one time per week, and that during the most recent reporting period, four of the incidents occurred outside of the classroom during unstructured time (P-16-7), the June 19, 2013 IEP nowhere defines or quantifies the Student’s “explosive episodes.” *See, e.g.*, P-16-8.

273. Accordingly, the undersigned finds that Emotional, Social and Behavioral Development Goal #2 is inadequate because there is no baseline from which to measure progress and no definition of what constitutes an “explosive episode.”

274. The June 19, 2013 IEP continued the hours of specialized instruction, OT and behavioral support services prescribed in the February 14, 2013 IEP. P-16-9.

275. Petitioner, her counsel and Educational Consultant requested that the Student receive all of his instruction in the outside of general education setting, noting that none of his behavior incidents occurred in the special education setting. P-50-2.

276. The June 19, 2013 IEP stated that the Student did not require transportation and was silent on his need for ESY services. P-16-12.

277. Petitioner asserted that the Student required ESY services and that Respondent had failed to “examine [the Student’s] levels in all of his areas of need right before breaks and right after breaks in order to know whether he regressed.” P-50-3.

278. The undersigned finds that Respondent improperly failed to consider whether the Student needed ESY services, particularly in view of evidence that his reading skills regressed over the summers (*See*, P-23, P-24).

279. Based upon the entire record, particularly evidence of the Student's frequent elopement from the classroom, his disruptive behavior in the general education classroom and outside the classroom despite interventions and suspensions, and his lack of behavior problems in the special education setting, the undersigned finds that as of June 19, 2013, the Student required the following specialized instruction and related services not provided in the IEP developed that date: (a) all of his instruction to be provided outside of general education, (b) continual adult supervision if and when exposed to non-disabled peers anywhere in the school setting, (c) more intensive behavioral support services, and (d) transportation.

280. Based upon the entire record, the undersigned finds that the June 19, 2013 IEP was not reasonably calculated to provide the Student educational benefit.

November - December 2013 Speech-Language Evaluation

281. On November 22 and 25 and December 12, 2013, Speech-Language Pathologist #1 conducted a "Speech and Language Reevaluation" of the Student, with a report dated December 4, 2013.¹³ P-8-1.

282. The Student's overall receptive and expressive language skills were within the average range of functioning for his age. P-8-4.

283. The Student's hearing, oral motor skills, vocal parameters, rate and flow of speech, and pragmatic language all were within normal limits. P-8-4 and -5.

¹³ No explanation was provided for the report being dated prior to the date of the conclusion of the evaluation.

284. Speech-Language Pathologist #1 noted no immediate areas of concern regarding the Student's speech and language skills as related to his performance in the educational setting. P-8-5.

285. Speech-Language Pathologist #1 made recommendations concerning classroom accommodations. *Id.*

Services Delivered Under the June 2013 IEP

286. Petitioner introduced no evidence that the Student failed to receive specialized instruction pursuant to his IEP.

287. There is no evidence that the Student attended school during the summer of 2013 so no services were scheduled to be provided then.

288. During September 2013, the Student should have received three hours of OT and he received none (P-26-17), for a deficit of three hours.

289. During October 2013, the Student should have received three hours of OT and received two hours and fifteen minutes (*Id.*), for a deficit of 45 minutes.

290. During November 2013, the Student should have received three hours of OT but he received only 90 minutes (P-26-19), for a deficit of 90 minutes.

291. During December 2013, the Student should have received 90 minutes of OT after adjusting for school closures during the winter break, but he received only 30 minutes (P-26-20), for a deficit of an hour.

292. During January 2014, the Student should have received three hours of OT but he received only 45 minutes (P-26-21), for a deficit of two hours and 15 minutes.

293. During February 2014, the Student should have received three hours of OT but he received only 30 minutes (P-26-22), for a deficit of two hours and 30 minutes.

294. During March 2014, the Student should have received three hours of OT but he received only 30 minutes (P-26-24), for a deficit of two hours and 30 minutes.

295. During April 2014, the Student should have received three hours of OT but he received only one hour (P-26-26), for a deficit of two hours, 30 minutes of which was attributable to the school closure for spring break.

296. During May 2014, the Student should have received three hours of OT but he received only 90 minutes (P-26-28), for a deficit of 90 minutes.

297. From June 1 through 18, 2014, the Student should have received, and received, 90 minutes of OT. P-26-29.

298. Thus, from September 2013 through June 18, 2014, the Student received ten hours of OT, when he should have received 27 hours, for a deficit of 17 hours, constituting a deficit of 63 percent of the OT he should have received. Adjusting for 30 minutes missed due to spring break, the OT deficit was 16.5 of 26.5 hours, or 62 percent.

299. The undersigned finds that Respondent's failure to deliver 62 to 67 percent of the OT the Student should have received was a material failure to implement that element of his June 19, 2013 IEP.

300. During September 2013, the Student should have received two hours of behavioral support services. Apparently he received no such services (P-28-7 and -8), for a deficit of two hours.

301. During October 2013, the Student should have received two hours of behavioral support services and received three hours and 45 minutes (P-28-8), a surplus of one hour and 45 minutes.

302. During November 2013, the Student should have received two hours of behavioral support services and he received two and a half hours (P-28-10), a surplus of half an hour.

303. During December 2013, the Student should have received an hour of behavioral support services after adjusting for school closures during the winter break, but he received only 45 minutes (P-28-12), for a deficit of 15 minutes.

304. During January 2014, the Student should have received two hours of behavioral support services but he received only 45 minutes (P-28-13), for a deficit of an hour and 15 minutes.

305. During February 2014, the Student should have received two hours of behavioral support services but he received only an hour and a half (P-28-14), for a deficit of 30 minutes.

306. During March 2014, the Student should have received two hours of behavioral support services but he received only an hour and a half (P-28-15), for a deficit of 30 minutes.

307. During April 2014, the Student should have received, and received, two hours of behavioral support services (P-28-17).

308. During May 2014, the Student should have received two hours of behavioral support services but he received only an hour and 45 minutes (P-28-18), for a deficit of 15 minutes.

309. From June 1 through 18, 2014, the Student should have received an hour of behavioral support services. Apparently he received no such services (P-28-18), for a deficit of one hour.

310. Thus, from September 2013 through June 18, 2014, the Student received 14.5 hours of behavioral support services, when he should have received 18 hours, for a deficit of 3.5 hours, constituting a deficit of 19 percent of the behavioral support services he should have received.

311. Given the Student's increasing behavioral concerns, the undersigned finds that Respondent's failure to deliver 19 percent of the behavioral support services the Student should have received was a material failure to implement that element of his June 19, 2013 IEP.

The Student's Academic Performance From June 19, 2013 through May 27, 2014

312. There is no evidence in the record that the Student attended school during the summer of 2013.

313. During the first term of SY 2013-2014, the Student earned grades of "1" in Reading, Speaking and Listening, and Math; grades of "2" in Writing and Language, Social Studies, and Science; grades of "3" in Art and Health and Physical Education; and a grade of "4" in Music. P-20-1.

314. During the first term of SY 2013-2014, the Student's skills were "Beginning" in all areas except the following: His skills were "Developing" in "Write opinions, supported by reasons about subjects or texts," "Write and speak using standard

English grammar,” “Study D.C. as a state and local government . . .,” and “Read and Write Music,” and Art; and his skills were “Secure” in three of five aspects of Music. P-20-2 and -3.

315. During the second term of SY 2013-2014, the Student’s grades remained the same as during the first term except his grade in Speaking and Listening improved from “1” to “2.” P-21-1.

316. During the second term of SY 2013-2014, the Student’s skills remained the same as during the first term except he advanced from “Beginning” to “Developing” in one aspect of Speaking and Listening and two aspects of Science. P-21-2 and -3.

317. During the third term of SY 2013-2014 the Student’s grades remained the same as during the second term except his grade in Speaking and Listening reverted to a “1” and his grade in Math improved to a “2.” P-21-1.

318. During the third term of SY 2013-2014, the Student’s skills remained the same as during the second term except he advanced from “Beginning” to “Developing” in two aspects of English Language Arts, one aspect of Writing and Language, one aspect of Speaking and Listening, both aspects of Number and Operations – Fractions, and one aspect of Measurement and Data; and he advanced from “Developing” to “Secure” in “Read and write music” and both aspects of Health and Physical Education. P-21-2 and -3.

The Student’s Behavior and Discipline From June 19, 2013 through May 27, 2014

319. During the first term of SY 2013-2014, the Student rarely did the following: followed directions, completed class work on time, worked well with others/cooperated,

used time wisely, completed and returned homework, followed playground rules/school rules, respected the rights/property of others, and practiced self control, P-20-1.

320. During the first term of SY 2013-2014, the Student required frequent prompting to do the following: participate in class discussion, make an effort, follow classroom rules, and listen while others speak. *Id.*

321. During the first term of SY 2013-2014, the Student often was unwilling to participate in group work and preferred to work one-on-one with the teacher, but she did not often have the opportunity to sit with him. *Id.*

322. During the first term of SY 2013-2014, the Student was at times unwilling to come into class and sit down to attempt the work “because he has already deemed it to be too difficult.” *Id.*

323. During the first term of SY 2013-2014, the Student “constantly” started fights with other students, used foul language, and preferred “to roam the halls or play on the computers than participate in a lesson or even a class building activity.” *Id.*

324. During the first term of SY 2013-2014, the Student had few friends and engaged in a lot of attention-seeking behavior. *Id.*

325. On October 15, 2013, the Student took a peer’s pencil, kicked the peer’s chair, threw materials and hit the peer with them, became enraged while the teacher held his wrist, jerked away and began swinging his fist, hit the teacher in the hand and the side, picked up a metal projector stand and threatened to throw it, and left the class with the occupational therapist, “smiling and laughing as if he hadn’t done anything.” P-36-1 and -2.

326. For his conduct on October 15, 2013, the Student was suspended for two days. P-37-1.

327. On October 29, 2013, the Student refused to come to class, refused to complete an assignment, left the teacher's space, returned running past and screaming, stood on a table, yelled at peers, and pushed a peer into the restroom. P-38-1.

328. On October 30, 2013, the Student put his hand in peers' faces as if he would hit them, pushed peers, made rude comments to peers, punched and fought with a peer, struck a teacher on the arm, repeatedly pushed a teacher, and jumped at a teacher as if he were going to hit her. P-39-1 and -2.

329. Later on October 30, 2013, the Student climbed on a windowsill, placed both of his feet out of the window, yelled at peers, climbed down and said "I want to die!" P-40.

330. Later on October 30, 2013, Attending School staff called ChAMPS [Children & Adolescent Mobile Psychiatric Service] to assess the Student. P-52-1.

331. The ChAMPS staff concluded that the Student did not need to be transported to the hospital. *Id.* Instead, the Student, Petitioner and a ChAMPS staff member executed a "Contract for Safety," in which the Student stated, *inter alia*, that he would not hit himself or others. P-41-1. The document listed options for the Student instead of hurting himself or others, including calling the ChAMPS hotline. *Id.*

332. For his behavior on October 30, 2013, the Student received a two-day "unofficial" suspension. P-42-1. There is no evidence in the record defining an "unofficial" suspension.

333. At a follow-up assessment on October 31, 2013, attended by ChAMPS, Psychiatrist found no need for the Student to be hospitalized, and recommended that Attending School “better utilize the existing supports, which include his therapist ... as well as his IEP services....”¹⁴ P-52-1.

334. On November 5, 2013, the Student called a peer a name, pushed the peer, grabbed the peer, was struck in the eye by the peer, yelled obscenities at the peer, threatened to shoot the peer, and fought with the peer. P-43.

335. On November 7, 2013, Petitioner’s counsel emailed the principal of Attending School, stating that Petitioner had not been kept informed of the Student’s social-emotional problems at school over “the last few weeks.” P-52-1. Petitioner’s counsel requested that Petitioner receive earlier notification so that the concerns could be addressed by the Student’s therapist. *Id.* Petitioner’s counsel requested that the Student’s IEP Team convene to discuss “what special education services should be added into [the Student’s] IEP and BIP to intervene, teach skills, and avoid additional suspensions, or discuss other changes to his services or placement so that his needs will be met.” *Id.*

336. There is no evidence in the record that such a meeting was convened.

337. On November 11, 2013,¹⁵ the Student placed his arm around a peer’s neck and held his hand over her nose. P-44.

¹⁴ This information was conveyed to the Attending School principal via email on November 7, 2013, along with permission for a DCPS psychiatrist to visit the Student at school as a special education evaluation and a request for documentation of any then-effective suspension. *Id.*

¹⁵ There is no evidence in the record explaining how this incident could have occurred on November 11, 2013, which was Veterans’ Day, observed as a holiday by Respondent.

338. On December 13, 2013, the Student grabbed several peers, refused to join the class, grabbed a bag of snacks and began to eat them, threw the snacks at the teacher, called the teacher a “stupid lady,” pushed the teacher, and walked out of the room. P-45.

339. During the second term of SY 2013-2014, the Student’s work habits, personal and social skills declined. In addition to the things he rarely did in the first term, in the second term he rarely participated in class discussion, made an effort, followed classroom rules, or listened while others spoke. P-21-1.

340. On February 25, 2014, the Student took the teacher’s cellphone and left it behind a bathroom stall. P-46-1.

341. During the third term of SY 2013-2014, the Student’s work habits, personal and social skills improved slightly; instead of rarely participating in class discussion and making an effort, he did so with frequent prompting. *Id.*

342. During the third term of SY 2013-2014, the Student completed “less” class assignments than previously, making it impossible for the teacher to measure his progress. P-21-4.

343. During the third term of SY 2013-2014, although the Student participated in reading and discussions in small groups, “when given an independent task he refuse[d] to complete it and often [left] the class without permission.” *Id.*

344. Toward the end of the third term of SY 2013-2014, the Student had shown more interest in his learning; he stayed in class more often, sat beside the teacher, completed tasks given to him, asked questions, and made a real effort. *Id.*

345. Despite these improvements, the Student continued to instigate fights and at times attacked peers “because of something he says they said or did to him.” *Id.*

May 2014 Behavior Intervention Plan

346. On May 28, 2014, the Student's BIP was revised. P-17-1.

347. The revised BIP provided that, when the teacher noticed that the Student was becoming frustrated or angry, the Student would be provided the option to "take a break" in a designated place in the classroom. *Id.* This is substantially the same as the "take a break" provision of the February 13, 2013 BIP. P-15-1.

348. The May 28, 2014 BIP also provided that the Student would work with identified staff to develop a behavior contract with teacher-rated and Student-rated measures and a monitoring sheet that would be reviewed daily by the special education teacher. P-17-1.

349. The behavior contract was to include a point system allowing the Student to work toward a desired reward that the Student should be included in identifying. *Id.*

350. In the event the Student presented escalating and/or aggressive behaviors when taking a break and self soothing strategies had been refused, the May 28, 2014 BIP provided that the Student should immediately be removed from the classroom. *Id.* This is substantially the same as the "Consequences" provision of the February 13, 2013 BIP. P-15-1.

351. The BIP should have stated the "function," *i.e.*, the cause of the Student's behavior, and the replacement behaviors other than just "taking a break" or removing the Student from the classroom, which may reinforce the inappropriate behavior. Testimony of Educational Consultant.

352. The BIP should describe how the Student will be taught to identify when he is feeling frustrated or angry. *Id.*

353. The BIP should include provisions to collect data, following the ABC-R approach (*i.e.*, Antecedent, Behavior, Consequence, Response). *Id.*

354. Given the Student's escalating behavior problems, the undersigned finds that the minor changes in his BIP were not reasonably calculated to address those problems.

May 2014 IEP

355. The Student's IEP was revised on May 28, 2014. P-18-1.

356. The May 28, 2014 IEP noted that the Student's behavior impeded his learning or that of others. *Id.*

357. The May 28, 2014 IEP stated that the Student had stopped distracting other students, but that he had been observed, on occasion, verbally bullying other students and eloping from the classroom—target behaviors that were addressed in his BIP. *Id.*

358. Despite the fact that the Student was performing two grade levels below Current Grade (Stipulation of counsel at the DPH) the May 28, 2014 IEP does not identify Mathematics as an area of concern (P-18); accordingly, the IEP contains no PLOPs or goals for Mathematics.

359. The undersigned finds the failure to include Mathematics as an area of concern and to state the Student's PLOPS, needs and goals in that area is inappropriate, and the May 28, 2014 IEP was not reasonably calculated to confer educational benefit in Mathematics.

360. The May 28, 2014 IEP stated the Student's PLOP in Reading as follows:

[The Student] reads at an independent level G.... [He] reads level G texts with 96% accuracy. [He] is able to answer 4 out of 5 reading comprehension questions in a level G text. [He] is able to read a level I text with 90% accuracy. The expectation is for students to read at a level P

at the end of [the grade in which the Student then was placed]. [The Student] struggles with decoding multisyllabic words and words with vowel teams (piece). [He] demonstrates a reluctance to attack words with which he is unfamiliar. [He] will often stop reading and make an appeal. [He] will not continue reading a text unless he either guesses the word or it is given. [The Student] does not like to use decoding strategies (like tapping words out or identifying word chunks). [He] does not like to read texts that are wordy, even if the text is on his reading level. He often requires that texts be modified or given in smaller parts. [The Student] experiences frustration when reading. When he is frustrated, he often stumbles over words that he knows (we=you). During these times, [he] benefits from breaks and praise. [The Student] has made great improvement in his sight word reading ability. [He] is now able to read and recognize 100% (41/41) of the Preprimer words, 88% (46/52) of the primer words, 90% (37/41) of the 1st grade list, 82% (38/46) of the 2nd grade list, and 78% of the 3rd grade Dolch sight word list.¹⁶

P-18-3.

361. The Student's reading level of "G" was an increase of three reading levels from the February 2013 IEP when the Student was reading at an independent level "D."

P-14-2.

362. The expectation for students in the grades in which the Student was placed in SY 2012-2013 and SY 2013-2014 was to increase three reading levels per year, so the Student appears at first glance to have made one year's progress in one school year.

Compare, P-14-2 with P-18-3.

¹⁶ Educational Consultant testified that the instruction using Dolch sight words should not progress from one grade level to the next until the child achieves 90 percent. On cross-examination, Respondent's counsel attempted to discredit Educational Consultant by eliciting her testimony that "exposure" to sight words at a child's age-appropriate grade would be beneficial to a child even if the child were reading below that grade. The undersigned sees no inconsistency in stating that a child should not be *instructed* with sight words at a higher level until achieving mastery at a lower level, and at the same time stating that a child would benefit from *exposure* to sight words at a higher level.

363. However, the Student was reading at level “G” at the end of SY 2012-2013. P-23-1. He regressed during the first part of SY 2013-2014. *Id.* His recovery back to level “G” therefore reflects *no progress* from the end of SY 2012-2013.

364. Accordingly, the undersigned finds that the Student’s Reading PLOP was misleading because it implied that he was making progress when he was not; the misleading PLOP interfered with the IEP Team’s ability to develop the Student’s Reading needs and goals.

365. The Student’s Reading PLOP lacked specificity, for example, in what types of syllables he was fluent, his ability to decode nonsense words to learn the rules of phonics, and whether his comprehension difficulties were literal (*e.g.*, who, what or where) or inferential (*e.g.*, why or how). Testimony of Educational Consultant.

366. The undersigned finds that the lack of specificity in the Student’s Reading PLOP interfered with the IEP Team’s ability to develop the Student’s Reading needs and goals.

367. The May 28, 2014 IEP statement of the Student’s needs in the area of Reading (P-18-3) is substantially the same as in the June 2013 IEP (P-16-3), which the undersigned found to be incomplete. *See*, Finding of Fact 230.

368. The May 28, 2014 IEP statement of the Student’s annual goals in Reading (P-18-3 and -4) is substantially the same as in the June 2013 IEP (P-16-3 and -4), except Goal #2 was modified as follows: The Student now is expected to learn only five new high frequency words per month rather than 10-15 words, but he is expected to learn them with 100% accuracy rather than 80% accuracy.

369. The Student's Reading goals continued to fail to address inferential comprehension, as Petitioner had requested. P-50-2 and -3.

370. The undersigned finds that the Student's Reading goals continued to be incomplete due to the incomplete nature of his Reading PLOP and Reading needs, especially the lack of any goal related to inferential comprehension and any goal stating what text the Student should be reading at what percent of accuracy by what date.

371. The undersigned finds that the static nature of the Student's Reading goals indicates a failure of the May 28, 2014 IEP to confer educational benefit, rendering repetition of the same goals without any substantial change in services not reasonably calculated to confer educational benefit in the future.

372. The May 28, 2014 IEP stated the Student's PLOP in written expression as follows:

[The Student] has a weakness in his writing ability. [He] struggles with his quality of writing and writing stamina. [He] is reluctant to write opinion pieces that require statement of topic and three supporting details, except when he is able to write about a high interest topic. [The Student] struggles to spell grade level sight words and irregularly spelled words. [He] is now able to read and recognize 100% (41/41) of the Preprimer words, 88% (46/52) of the primer words, 90% (37/41) of the 1st grade list, 82% (38/46) of the 2nd grade list, and 78% of the 3rd grade Dolch sight word list. With his ability to read these words, he is able to spell some of these words as well. However, when [he] encounters a word he is not able to spell, he usually gives up and refuses to complete writing assignments. [He] will often make an appeal and ask the teacher to spell the word for him. [He is] reluctant to take risks in writing/spelling and does not use inventive spelling within his writing, unless prompted by [the] teacher. [The Student] is easily frustrated with writing tasks. [He] requires breaks and bargaining in order for him to complete writing tasks. [He] is very careful and meticulous when writing. He does not like to make mistakes. When he does make a mistake, he becomes frustrated.

P-18-5.

373. Except for the references to the Student's *reading* ability, this Written Expression PLOP is substantially the same as the PLOP in the February 2013 IEP (P-14-3) and June 2013 IEP (P-16-4), which the undersigned finds to have been insufficient. *See*, Findings of Fact 185 and 256, *supra*.

374. The use of sight words as a Written Expression PLOP is inappropriate, because sight words are not intended to be spelled. Testimony of Educational Consultant.

375. Rather, the Student's ability to spell syllable types is the appropriate measure for his Written Expression PLOP because 80 percent of the English language follows phonetic rules and learning syllable types is essential to learning to read and spell that 80 percent. *Id.*

376. The Student's Written Expression PLOP also should state his *ability* to write sentences; stating that he is *reluctant* to write describes his behavior, not his writing ability. *Id.*

377. Based upon the entire record, the undersigned finds that the Student's Written Expression PLOP was inadequate and interfered with the IEP Team's ability to develop his Written Expression needs and goals.

378. The May 28, 2014 IEP statement of the Student's needs in the area of Written Expression (P-18-6) is the same as in the June 2013 IEP (P-16-5), indicating failure of the prior IEP to confer educational benefit.

379. Educational Consultant opined that the Student's Written Expression goals should include writing a topic sentence, three supporting details and a concluding sentence because even a child with learning disabilities should be able to do that by the

end of the grade below Current Grade, depending on the child's place on the (learning disability) continuum.¹⁷ Testimony of Educational Consultant.

380. Because the Student's Written Expression needs in the May 28, 2014 IEP were based upon a deficient PLOP, and because the Student's Written Expression goals were based upon the deficient PLOP and needs, the undersigned finds that the Written Expression goals in the May 28, 2014 IEP were deficient.

381. Because the May 28, 2014 statement of the Student's annual goals in Written Expression (P-18-6 and -7) is substantially the same as in the June 2013 IEP (P-16-5 and -6), this indicates failure of the prior IEP to confer educational benefit, rendering repetition of the same goals without any substantial change in services not reasonably calculated to confer educational benefit in the future.

382. The May 28, 2014 IEP stated the Student's Motor Skills/Physical Development PLOP as follows:

[The Student] utilizes a modified tripod grasp. [He] makes progress with letter formation, and spacing. He continues to demonstrate no challenges with sensory processing; however, some sensory filtering and registration behaviors are present. [The Student] has made progress with visual perceptual skills. He is able to locate hidden pictures amongst competing background, as well as complete 24-3[0] piece puzzles. He completes simple words and sentences 4-5 from blackboard and worksheet (near point) with appropriate spacing of letters, cues for orientation of lines, and size alignments of letters. He requires cues to read for mistakes and correct use of capital letters and punctuation. [The Student] is independent with self care skills as they relate to classroom tasks.

P-18-9.

¹⁷ On cross-examination, Educational Consultant acknowledged that a child, like the Student, whose Written Expression performance was three grades below Current Grade, would not be able to do that. The undersigned sees no inconsistency, because Educational Consultant was speaking to the appropriate *goal* toward which the Student would progress with appropriate specialized instruction and supports.

383. The undersigned finds that the Motor Skills/Physical Development PLOP in the May 28, 2014 IEP is a sufficient basis to determine the Student's Motor Skills/Physical Development needs and goals.

384. The May 28, 2014 IEP does not contain a statement of the Student's needs in the area of Motor Skills/Physical Development; rather, in the section entitled "Description of how the student's disability affects the student's access to the general education curriculum" (P-18-10), Respondent stated the accommodations that would be offered to the Student.

385. The undersigned finds that the May 28, 2014 IEP contains no actionable statement of the Student's Motor Skills/Physical Development needs upon which goals can be based.

386. Motor Skills/Physical Development Goal #1 in the May 28, 2014 IEP (P-18-10) is substantially the same as Goal #1 in the June 2013 IEP (P-16-8); the only difference, which the undersigned finds not to be material, is that the Student now is expected to recall five to 10 items rather than precisely five items.

387. The May 28, 2014 IEP deleted the previous Motor Skills/Physical Development Goal #2 and Goal #3 while adding a new Goal #2, as follows:

[The Student] will complete/copy 4-7 sentences from the board with attention to line orientation, spacing, formation, letter sizing, correct use of capital letters and punctuation, with 80% accuracy over three consecutive settings.

P-18-10.

388. The undersigned finds that this is an appropriate goal for the Student, who appears to be making some progress in the area of Motor Skills/Physical Development.

389. The May 28, 2014 IEP stated the Student's Emotional, Social, and Behavioral Development PLOP as follows:

[The Student] is observed as a student with friends in his school setting. [He] is able to play among his peers at recess and other unstructured times throughout the day. It is reported by the teacher that [the Student] experiences episodes of defiance and difficulty interacting with his peer[s] in the classroom setting at times. [The Student] also demonstrates periods of time where he is emotionally regulated and able to successfully navigate his classroom environment. During the 2013-2014 school year [the Student] has demonstrated an increase in anxiety pertaining to his classwork. [He] feels easily overwhelmed by activities when presented with something he perceives as difficult for him. These feelings have resulted in the student leaving the designated classroom space and/or withdrawing from the classroom activities at times.

P-18-8.

390. While the undersigned finds that this PLOP is a sufficient basis to determine the Student's emotional, social and behavioral development needs and goals, the fact that the PLOP indicates increased anxiety, elopement from the classroom, and withdrawal, reflects the failure of the prior IEP to confer educational benefit.

391. The May 28, 2014 IEP statement of the Student's needs in the area of Emotional Social, and Behavioral Development (P-18-8) is substantially the same as in the June 2013 IEP (P-16-7), also indicating failure of the prior IEP to confer educational benefit.

392. The May 28, 2014 IEP statement of the Student's annual goals in Emotional, Social, and Behavioral Development (P-18-8 and -9) are substantially the same as in the

June 2013 IEP (P-16-7 and -8).¹⁸ This indicates failure of the prior IEP to confer educational benefit, rendering repetition of the same goals without any substantial change in services not reasonably calculated to confer educational benefit in the future.

393. Educational Consultant opined that the Student’s Emotional, Social and Behavioral Development goals should include self-regulation; initiating, maintaining and completion of work goals in the instructional setting; and making and keeping friends.¹⁹ Testimony of Educational Consultant.

394. The May 28, 2014 IEP decreased the Student’s specialized instruction in the outside of general education setting from two hours per day to 1.5 hours per day, added 1.5 hours per day of specialized instruction in the general education setting, retained the Student’s two hours per month of OT in the outside of general education setting, eliminated the Student’s one hour per month of OT in the general education setting, and rephrased the Student’s behavioral support services from two hours per month to 120 minutes per month. *Compare P-16-9 with P-18-11.*

¹⁸ Some wording was changed, *e.g.*, Goal #2 in the June 2013 IEP stated, “Through behavioral support services, the student will gain feeling and body awareness in order to employ calming techniques prior to becoming explosive, as evidenced by an 80% decrease in explosive episodes as documented by the classroom behavior tracking system” (P-16-8), while the May 2014 IEP states, “Through behavioral support services, the student will gain awareness of negative thoughts and their impact on feelings and behavior in order to decrease the prevalence of off task or defiant behavior in 4 out of 5 trials in the classroom setting” (P-18-9). The undersigned finds such semantic differences to be immaterial.

¹⁹ On cross-examination, Respondent’s counsel attempted to discredit Educational Consultant by eliciting her testimony that the PLOP stated that the Student was observed as having friends in the school setting. Educational Consultant explained that even though the Student might have friends at school, his interactions with peers in the classroom during instructional time—some of which had led to suspensions—should have been addressed. Testimony of Educational Consultant.

395. The May 28, 2014 IEP provided a number of classroom accommodations (P-18-13) with which Educational Consultant agreed. Testimony of Educational Consultant.

396. Educational Consultant opined that the Student required additional accommodations, including planned sensory breaks, planned movement breaks, a daily behavior plan with a “token economy,” reinforcement at least every 15 to 20 minutes, and having him paraphrase back concepts as well as teacher instructions.²⁰ *Id.*

397. Given the failure of the prior IEP to confer educational benefit in the areas of Mathematics, Reading, Written Expression and Emotional, Social, and Behavioral Development (*See*, Findings of Fact 248, 250, 253, 256,258, 260, 262, 264, 265, 268-272, 274, 279 and 280, *supra*), the undersigned finds that the May 28, 2014 IEP, adding only one hour per day of specialized instruction, and shifting some of that instruction from the outside of general education setting to the general education setting, was not reasonably calculated to confer educational benefit upon the Student. It was simply not reasonable for Respondent to assume that if two hours per day of specialized instruction in the outside of general education setting had almost no effect, that three hours per day split between the general education and outside of general education settings would enable the

²⁰ On cross-examination, Respondent’s counsel attempted to discredit Educational Consultant by eliciting her testimony that the May 28, 2014 IEP did include paraphrasing as an accommodation. Educational Consultant explained that having the teacher repeat his or her own instructions is not the same as having the Student paraphrase those instructions, thereby demonstrating understanding. Respondent’s counsel also attempted to discredit Educational Consultant by challenging her testimony that the accommodation of use of calculators (P-18-13) did not belong in the IEP. Educational Consultant explained that because the IEP did not have Mathematics as an area of concern, and therefore had no Mathematics PLOPs or goals, the use of a calculator was not supported by the IEP.

Student to access the general education curriculum.²¹

398. Although there is no evidence in the record that Petitioner or her representatives objected to the May 28, 2014 IEP at the meeting, there is no evidence in the record that Petitioner or her representatives approved of the IEP at the meeting. Accordingly, the undersigned declines to draw an inference of waiver.

Services Delivered Under the May 2014 IEP

399. Petitioner introduced no evidence that the Student failed to receive specialized instruction pursuant to his IEP.

400. During June 1-10, 2014, the Student should have received 90 minutes of OT and he received those 90 minutes. P-26-29.

401. During June 1-10, 2014 the Student should have received 30 minutes of behavioral support services. There is no evidence that he received any such services (*See*, P-28-18), for a deficit of 30 minutes.

402. The undersigned finds that the failure to provide 30 minutes of behavioral support services was not a material failure to implement the Student's May 2014 IEP.

403. There is no evidence of services received during SY 2014-2015, which had not begun when the DPC herein was filed.

²¹ Due to the overall inadequacy of the May 28, 2014 IEP, it is unnecessary for the undersigned to make a specific finding as to the appropriateness of the classroom accommodations. If such a finding were required, the undersigned would find that Petitioner has not met her burden of proving by a preponderance of the evidence that the accommodations are inappropriate or insufficient.

The Student's Academic Performance From May 28, 2014 to Date

404. During the fourth term of SY 2013-2014, the Student's grade in Math remained a "2"; his grades in Reading, Writing and Language, and Speaking and Listening improved to a "2"; his grade in Social Studies improved to a "3"; and his grade in Health and Physical Education improved to a "4." P-21-1.

405. Despite the Student's improved grade in Reading, he made no reading growth during the second half of SY 2013-2014 (*Id.*) and was rated "Needs Most Support" on all sections of the June 6, 2014 reading assessment ("mCLASS Literacy Progress Report") (P-22). The Student's reading level at the end of SY 2013-2014—level "G"—was the same as at the end of SY 2012-2013. P-23-1.

406. By the end of SY 2013-2014, the Student was good at "picking up patterns in math and using them to help with his learning," but he continued to count on his fingers. *Id.*

407. During the fourth term of SY 2013-2014, the Student's skills remained the same as during the third term except he advanced from "Beginning" to "Developing" in two aspects of Reading, two aspects of Writing and Language, one aspect of Speaking and Listening, two aspects of Measurement and Data, one aspect of Social Studies, and one aspect of Music; and he advanced from "Developing" to "Secure" in the remaining two aspects of Health and Physical Education. P-21-2 and -3.

408. Based upon the entire record, the undersigned finds that the Student's slightly increased grades during the fourth term of SY 2013-2014 were not an accurate reflection of his academic achievement, and that in fact he made no substantial academic progress during that term.

409. Petitioner observed no improvement in the Student's reading or math as a result of summer school during 2014. Testimony of Petitioner.

410. There is no evidence in the record of the Student's academic achievement, if any, during SY 2014-2015 which began two weeks prior to the DPH.

The Student's Behavior and Discipline From May 28, 2014 to Date

411. During the fourth quarter of SY 2013-2014, the Student's work habits, personal and social skills increased slightly in three areas; with frequent prompting, he followed directions, used time wisely, and listened while others spoke. P-21-1.

412. During the fourth quarter of SY 2013-2014, the Student often refused to participate in small group instruction. P-21-1.

413. During the fourth quarter of SY 2013-2014, the Student was more engaged and willing to participate, and his relationship with other students improved. *Id.*

414. The Student's summer school teacher during the summer of 2014 called Petitioner once to inform her that he had needed to talk to the Student (apparently about his behavior), but he did not need to send the Student home. Testimony of Petitioner.

415. The Student did not have any other behavior problems and he had no discipline at summer school in 2014.²² Testimony of Petitioner.

416. The Student has not had any behavior problems or discipline at school during the first two weeks of SY 2014-2015.

²² Petitioner testified that she did have problems with the Student at home during the summer of 2014. In his closing argument, Respondent's counsel made an *ad hominem* statement that perhaps Petitioner needed parenting lessons. Given the Student's serious and well-documented disabilities and his history of disciplinary actions at school, that statement was entirely unwarranted.

417. Because summer school is only half a day (Testimony of Petitioner) and there was no evidence introduced describing the instructional program, the undersigned declines to infer from the Student's lack of discipline at summer school that his behavioral problems are resolved.

418. Similarly, because the two weeks of a new school year may be less challenging than typical weeks, and there was no evidence introduced describing the Student's classroom, student to teacher ratio, or any other aspects of his current setting, the undersigned declines to infer from the Student's lack of discipline during those two weeks that his behavioral problems are resolved.

July 2014 Request for Change in Placement

419. On July 2, 2014, through counsel, Petitioner sent a letter via email and facsimile to the Attending School principal, attaching copies of prior correspondence, and requesting placement "in a full-time special education nonpublic school for his learning disabilities and ADHD as soon as possible." P-53-2 and -3.

July 2014 Resolution Session Meeting²³

420. On July 23, 2014, a Resolution Session Meeting ("RSM") was held to discuss resolution of the instant DPC. Testimony of Investigator.

421. At the RSM, Petitioner requested a full time outside of general education placement and compensatory education for the Student. *Id.*

²³ Events subsequent to the filing of the DPC herein are relevant to the extent the conduct of the parties informs the appropriate equitable relief for denial of FAPE.

422. At the RSM, Respondent's representative stated that he would "get back" to Petitioner and her representatives regarding a potential full-time special education public school placement. *Id.*

423. No representative of Respondent subsequently informed Petitioner or her representatives of any change in placement or location of services for the Student until the IEP Team meeting held in September 2014. *Id.*

July - August 2014 Psychological/Psychoeducational Evaluation

424. On July 21, 2014, after the DPC in the instant case was filed, Expert Psychologist conducted a Psychological/Psychoeducational Evaluation of the Student, issuing a report dated August 26, 2014²⁴ (P-9-1) that was provided to Respondent the same day (P-54-1).

425. The Student had taken his ADHD medication that morning. Testimony of Petitioner.

426. The Student's FSIQ score was 72, which is in the Borderline range of functioning and his score on the Perceptual Reasoning Index was higher than his scores on the other indexes. P-9-6.

427. Expert Psychologist opined that the Student's actual FSIQ is higher than the test results indicated because his lack of academic progress reduced his scores.

Testimony of Expert Psychologist.

²⁴ Although this evaluation was not available to Respondent prior to August 2014, the undersigned admitted it into evidence because the Student's current psychological or psychoeducational state bears on the appropriateness of various possible remedies for denials of FAPE, including a prospective placement.

428. Compared with previous testing, the Student's Verbal Comprehension and Perceptual Reasoning scores had declined slightly, while his Working Memory and Processing Speed had increased (which Expert Psychologist attributed to his ADHD medication). P-9-7.

429. The Student's raw scores did not change substantially from previous testing; the changes in his "standard" scores (which compare him with same-age and same-grade peers) declined because he failed to make the progress that would have been expected. Testimony of Expert Psychologist.

430. The pattern of the Student's scores was the same as before. *Id.*

431. The Student's academic deficits were obvious. For example, he performed math calculations by counting on his fingers or writing "tick marks" to represent the numbers; his spelling, grammar and syntax were "off" in very simple and basic sentences; and when reading aloud he skipped words he did not know. *Id.*

432. The Student processed non-verbal information well, especially when it had context or structure; he had difficulty with more abstract reasoning, especially when he was assessed in a timed manner. P-9-7.

433. The Student's performance on tasks of "pure visual-motor processing speed (Coding and Symbol Search)" fell in the low end of the Borderline range, suggesting that he could work too quickly on unfamiliar tasks and therefore make more "impulse mistakes." P-9-8.

434. The Student's visual-spatial reasoning skills were low, leading him to become fixated on particular details while losing the "Gestalt," for example, becoming

fixated on a word and losing the meaning of the paragraph. Testimony of Expert Psychologist.

435. Occupational therapy would remediate the Student's visual-motor and visual-spatial reasoning deficits, "training or retraining the brain to connect the dots ... learning to make those connections." *Id.*

436. The Student's scores on academic achievement tests fell in the Borderline range, with his math and writing skills more than two grade levels below Current Grade, and his reading skills almost two grade levels below Current Grade. P-9-8 and -9.

437. The Student had made slight progress in reading and writing but his progress was still significantly below expectations for his age and grade, and he had made no progress in math. Testimony of Expert Psychologist, P-9-12.

438. With the Student's general level of intellect as measured in past cognitive testing, Expert Psychologist would have expected him to have made at least a grade or two of progress over the past two school years. Testimony of Expert Psychologist.

439. The results of the Student's personality testing suggested mild depression, difficulty communicating feelings, negative self-perception, low self-esteem, and significant feelings of insecurity and inadequacy in dealing with problems. P-9-10.

440. The personality testing also suggested that the Student has "limited psychological coping resources and because his more impulsive and negative perceptions sway his views, his view of himself, his goals, and his place in the world are all quite pessimistic, and he feels helpless to change the circumstances." *Id.*

441. The Student is in need of "a great deal of emotional and physical support," but is unsure how to get it, and when he does not receive sufficient recognition and

reinforcement from others, he “is likely to become frustrated and negativistic and likely more withdrawn.” *Id.*

442. The Student acknowledged to Expert Psychologist that he becomes frustrated in class and then angry, and often leaves the class to seek out a counselor to help him calm down. P-9-11.

443. The Student recently engaged in fewer fights, but his frustration tolerance had been decreasing, resulting in his walking out of class. Testimony of Expert Psychologist.

444. The Student does not tolerate well over-stimulation and a lack of predictability and structure, and “much of his reactivity appears to be a self-protective defense against feeling overwhelmed.” P-9-12.

445. Expert Psychologist diagnosed the Student with ADHD, Combined Presentation; Dysthymic Disorder; and SLD with impairments in reading, math and written expression. *Id.*

446. Expert Psychologist opined that the Student’s ADHD significantly impairs his ability to benefit from the learning environment because it limits his ability to concentrate and leads to frustration. Testimony of Expert Psychologist.

447. Expert Psychologist opined that the Student’s dysthymia limits his self-confidence regarding tackling frustration and academic challenges. *Id.*

448. Expert Psychologist opined that the Student’s learning disabilities limit his ability to understand and make progress academically. *Id.*

449. Expert Psychologist recommended an updated psychiatric examination to discuss the most appropriate ADHD medication and dosing. P-9-12 and -13.

450. Expert Psychologist opined that the Student's past and current "accommodations"²⁵ had been inadequate and had contributed to his lack of progress.

P-9-13.

451. Expert Psychologist recommended that the Student

be placed in a school setting, full-time, with a smaller class size and a smaller student-teacher ratio than he has at present. He will require special assistance in reading, math, and writing but as these are present in almost all of his subjects, simply having pull-out services for him, in my opinion, is not sufficient. In a more structured, full-time placement, it is my hope and expectation that the smaller class size and more individualized attention will work together to limit his inattention and distraction (complementing his medication and recommended community-based therapy).

I would also recommend that an extra degree of psychotherapeutic support (individual and group therapies, preferably provided by an LICSW or Ph.D. level clinician), in addition to community-based individual therapy, be provided at school to address some of the emotional difficulties that stem from his learning issues. This should also help eliminate his frustration and subsequent desire to leave the classroom or disengage from the learning process. I would recommend that he be seen once a week in individual therapy (30 min) and as needed based on any immediate difficulties....

P-9-13.

452. Expert Psychologist opined that the Student's needs cannot be met by increasing "pull-out" services, and that anything less than a full-time outside of general education setting in a self-contained class would place the Student at risk of severe failure. Testimony of Expert Psychologist.

453. Expert Psychologist opined that the Student needs such a full-time setting, including "specials" (*i.e.*, non-core classes), lunch and recess, because of the need to maintain his level of attention and focus throughout the school day that would be

²⁵ From the context, it was apparent to the undersigned that Expert Psychologist was referring to specialized instruction and related services, not classroom accommodations.

diminished if he had to transition between general education and outside of general education settings. *Id.*

454. Expert Psychologist would have made the same recommendations in May 2012 based upon the evaluation by Licensed Clinical Psychologist. *Id.*

455. The undersigned accepts all of Expert Psychologist's findings and recommendations, none of which were contradicted by any evidence in the record.²⁶

August 2014 "Informal Assessment" of the Student

456. On August 18, 2014, Educational Consultant conducted in "Informal Assessment" of the Student, issuing a report dated August 29, 2014.²⁷ P-59-1.

457. The Student recognized words out of context with 100% accuracy at four grades below Current Grade, at 70% accuracy ("Frustration Level"²⁸) at three grades below Current Grade, and with 40% accuracy at two grades below Current Grade. *Id.*

458. The Student was able to decode when reading with 97% accuracy at three grades below Current Grade, with 94% accuracy at two and a half grades below Current Grade, and with 91% accuracy at two and a quarter grades below Current Grade. *Id.*

459. The Student's comprehension level was "Emerging" at two and a half and three grades below Current Grade. *Id.*

²⁶ Respondent attempted to discredit Expert Psychologist on cross-examination by eliciting testimony that Expert Psychologist had not administered the BASC, *i.e.*, the Behavior Assessment Scale for Children. However, Expert Psychologist explained that he utilized a clinical interview instead. Testimony of Expert Psychologist.

²⁷ Although this report was not available to Respondent prior to August 2014, it is relevant to determining remedies for denials of FAPE, including a prospective placement.

²⁸ The "Frustration Level" for a child is too high a level to be used to teach the child. Testimony of Educational Consultant.

460. When given three minutes to write as much as he wanted, the Student wrote:
“The watr star Spashing.” P-59-2.

461. The Student then said he was tired. Testimony of Educational Consultant.

462. This writing sample confirmed that the Student was not writing on grade level, he made errors in capitalization and punctuation, he did not know all of his syllable types, and he was not writing as much as a child in Current Grade would be expected to write in three minutes. *Id.*

Educational Consultant’s Recommendations

463. Educational Consultant recommends that the Student have full-time special education (*i.e.* outside of general education) in a small classroom with a low student to teacher ratio (no more than five to one),²⁹ a lot of structure, multisensory instruction, repetition, evidence-based reading instruction³⁰, and embedded social skills instruction. *Id.*

464. Educational Consultant opined that if the Student had received the interventions and accommodations described in the preceding paragraph from March 2013 to June 2014, he would have made a year’s academic progress. *Id.*

²⁹ Educational Consultant opined that the student to adult ratio could be somewhat higher, for example eight to one, for “specials” and for lunch and recess. Testimony of Educational Consultant.

³⁰ On cross examination, Respondent’s counsel attempted to discredit Educational Consultant by eliciting testimony that the Wilson reading program that was used in the Student’s classroom at Attending School was such an evidence-based program. Educational Consultant explained that although Wilson is evidence-based and can be differentiated to a child’s reading level, it was not used in that way when she observed the Student in his general education classroom. Educational Consultant clarified her testimony to reflect that her recommendation was that the Student receive evidence-based reading instruction differentiated to his current reading level.

465. Educational Consultant recommended that the Student receive one hour per week of one-on-one OT as well as OT embedded throughout the school day. *Id.*

466. Educational Consultant recommended the following modifications due to the Student's ADHD: verbal and visual prompts, a visual timer, checklists, repeated instructions, seating close to the teacher, reduced workload, reduced information presented on a page, use of a carrel or other quiet space, and a menu of locations in the classroom where he could go if overly stimulated. *Id.*

467. To provide the Student a FAPE and to remediate in part the harm caused by the (alleged) denials of FAPE, Educational Consultant recommended that the Student attend a private special education day school with teachers experienced in teaching children with SLD and ADHD (such as Non-Public School) where he should receive, *inter alia*, a differentiated evidence-based reading program, social skills instruction, and counseling.

468. To remediate the remainder of the harm caused by the (alleged) denials of FAPE, Educational Consultant recommended that for a two-year period the Student receive tutoring comprising one hour per day five days a week in reading interventions and three hours per week split between math and written language; and that the Student receive 100 hours of compensatory OT. *Id.*

469. Educational Consultant opined that the tutoring summarized in the preceding paragraph was the most the Student could benefit from without being exhausted. *Id.*

470. Petitioner introduced no evidence contradicting Educational Consultant's opinions summarized in the preceding three paragraphs.

September 2, 2014 IEP Team Meeting

471. The Student's IEP Team met on September 2, 2014 for Expert Psychologist to review his evaluation with the Student's IEP Team. P-64-1, testimony of Investigator.

472. Expert Psychologist participated by telephone. Testimony of Expert Psychologist.

473. When Expert Psychologist reviewed his evaluation, numerous members of the Student's IEP Team said that his findings were consistent with what they had seen. *Id.*, testimony of Investigator.

474. Based upon the entire record, the undersigned finds that Expert Psychologist's evaluation reinforced what already was known to Respondent about the Student's disabilities, his areas of concern, and his needs.³¹

475. Respondent's representatives indicated willingness to increase the Student's number of hours of specialized instruction at another public school to be identified later. Testimony of Educational Consultant.

476. Respondent's representatives stated that they would initiate the "LRE process downtown" and "get back to" Petitioner's representatives regarding a new placement for the Student. Testimony of Investigator.

³¹ The undersigned rejects the repeated assertions by Respondent's counsel at the DPH—which were unsupported by any evidence—that Expert Psychologist's evaluation presented new information justifying a full-time outside of general education program that Respondent could not previously have known the Student required, justifying more time for Respondent to identify a new school for the Student.

477. There is no evidence in the record³² that the Student's IEP was revised at the meeting or after.

478. As of the DPH, no representative of Respondent had informed Petitioner or her representatives of a new placement or location of services for the Student. Testimony of Investigator.

Non-Public School

479. Non-Public School is a private³³ day school located in the District of Columbia that serves students with learning disabilities, ADHD and other disabilities. Testimony of Associate Head, P-55-1, P-56-1 and -4.

480. The District of Columbia Office of the State Superintendent of Education ("OSSE") has approved Non-Public School for children the Student's age who have, *inter alia*, OHI and/or SLD. P-56-4.

481. On August 12, 2014, Non-Public School accepted the Student for SY 2014-2015 (*Id.*), and Petitioner's counsel notified Respondent the same day (P-62-1).

482. If the Student attends Non-Public School, he will receive instruction in all academic subjects in a self-contained classroom with seven other students, one teacher, a half-time assistant teacher, and two aides.³⁴ Testimony of Associate Head.

³² Respondent's counsel stated at the DPH that the IEP had been amended to provide full time out of general education instruction, but Respondent introduced no evidence to that effect.

³³ Respondent uses the term "non-public." Associate Head sometimes does as well.

³⁴ These aides are "dedicated" to other children but also able to incorporate social interactions so that learning can be collaborative and group oriented, including the Student.

483. Some of the children already in the class the Student would attend are at his approximate level of academic achievement. *Id.*

484. The Student also would receive instruction in “specialty” subjects such as art, physical education and computer science.³⁵ *Id.*

485. At Non-Public School, lunch is served “family style” in a multipurpose room with the teachers. *Id.*

486. During recess, a guidance counselor and a physical education teacher work with the children on the social interactions that are involved in physical games and sports, and they ensure that children with fine motor issues are included. *Id.*

487. At Non-Public School, “related services” such as OT are integrated into the classroom when appropriate, and provided in “pull out” sessions when appropriate. *Id.*

488. At Non-Public School, a counselor provides social skills training. *Id.*

489. Non-Public School uses an empathy-building program to teach children how to label and identify emotions and provide social problem solving skills. *Id.*

490. Non-Public School uses several research-based reading instruction programs, including the Wilson program, which is differentiated for small groups of up to three students who have similar profiles, strengths and weaknesses; if a child needs one-on-one reading instruction, Non-Public School will provide that. *Id.*

491. Non-Public School uses a computer-based program to teach phonics and phonemic awareness. *Id.*

³⁵ Associate Head testified that the “specials” teachers are not special-education certified. On cross-examination, Respondent’s counsel asserted that District of Columbia Municipal Regulations (“DCMR”) require Non-Public School’s teachers, including “specials” teachers, to be special-education certified; however, no evidence of such a provision of DCMR was introduced.

492. Non-Public School utilizes technology including text to speech recognition, e-book readers, and tablet computers to enhance student skills. *Id.*

493. Non-Public School teaches writing using several writing programs that include instruction in organizing and sequencing thoughts, handwriting, spelling and grammar. *Id.*

494. Non-Public School teaches math through a “recursive” program in which earlier skills are reintroduced continuously while new skills are being learned, comprising drill and repetition, supplemented with hand-on aids for children who have insufficient math vocabulary. *Id.*

495. Non-Public School’s teachers and assistant teachers all received training in how to instruct children with learning disabilities and ADHD. *Id.*

496. All teachers and staff at Non-Public School practice “Positive Behavior Support,” a program that includes a “token economy” system allowing children to earn prize points for appropriate behavior (*e.g.*, holding one’s temper when frustrated). *Id.*

497. Non-Public School’s teachers are trained in how to get students to advocate for themselves rather than acting out. *Id.*

498. A small number of students at Non-Public School have “safety plans” or BIPs. *Id.*

499. Non-Public School maintains data on student behavior to determine whether progress is being made, whether a specific tool is working, or if an intervention needs to be changed. *Id.*

500. Non-Public School staff includes speech-language technicians and psychologists (who implement behavior support services and provide consultation to teachers and crisis intervention). *Id.*

501. With Non-Public School's very small class size, individual attention, continuous monitoring for progress, and identification and remediation of children's weaknesses, it is not uncommon for children who matriculate at Non-Public School several grade levels behind the appropriate grade for their age to make more than one year of growth in a year once they develop a positive self-image and undo negative concepts about learning. *Id.*

502. If the Student attends Non-Public School, the first priorities are to work on his attitude, particularly his tendency to avoid tasks, and to develop in him the perception that he is smart and a capable learner; once the data showed that he was more confident, his learning could be accelerated and intensified, at which point he might benefit from tutoring in addition to the 30-hour weekly school schedule. *Id.*

503. Associate Head testified that Non-Public School can meet the Student's needs. *Id.*

504. The Student's self-regulation issues would be addressed at Non-Public School through programming targeted to his learning levels; through avoidance of power struggles by always giving the Student choices that still would meet the teacher's objectives; through physical proximity to the teacher; through training in positive and proactive behaviors to manage his frustration and anger; and through sensory strategies such as having him run an errand for the teacher when he becomes frustrated and

allowing him to demonstrate what he knows through using his hands rather than taking tests. *Id.*

505. Respondent introduced no evidence to that Non-Public School cannot meet the Student's needs.³⁶

506. Based upon the entire record, the undersigned finds that Non-Public School can meet the Student's academic and social-emotional needs.

507. Non-Public School's tuition, which is approximately Thirty-Nine Thousand Dollars per year (\$39,000) is set by OSSE. *Id.*

508. The services of the guidance counselor are included in the tuition. *Id.*

509. Behavior support services and other related services required by a child's IEP are billed separately, at rates set by OSSE. *Id.*

510. A division of Non-Public School provides private tutoring at Non-Public School. *Id.*

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

³⁶ In his closing argument, Respondent's counsel criticized the tuition at Non-Public School as well as the hourly rate (which he asserted was a hundred dollars) of the compensatory tutoring and OT requested by Petitioner, even though those rates are set by OSSE. Respondent's counsel characterized the total as an undue burden on the taxpayer, which is like blaming the victim of an automobile accident for the victim's ensuing medical bills. To the contrary, if a school district denies a child a FAPE, the cost of remediation is an *appropriate* burden on the taxpayer. The way to reduce the burden in the future is to provide FAPE. Respondent's counsel's warning that awarding full relief in this case will result in other children being "shortchanged" is alarmist, unfounded, unpersuasive and unprofessional.

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 individualized education program (“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)). The IDEA defines IEP as follows:

(i) In general: The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications

20 U.S.C. §1414(d)(1)(A).

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).

7. At the beginning of each school year, each public agency “shall have in effect, for each child with a disability in the agency’s jurisdiction, an [IEP].” 20 U.S.C. §1414(d)(2)(A); *accord*, 34 C.F.R. §300.323(a).

When an IEP Must be Revised

8. IEPs must be reviewed and revised:

Review and revision of IEPs—(1) *General*. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child’s anticipated needs; or

(E) Other matters.

34 C.F.R. §300.324(b).

Implementation of the IEP

9. If a public agency fails to implement an 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).

Authority of Hearing Officer to Order Prospective Placement in Private School

10. 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). That relief may include prospective services. *Id.*

11. In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005).

12. The IDEA provides that a public agency 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 and the parents elected to place the child in such private school or facility. 20 U.S.C. §1412(a)(10)(C)(i); *accord*, DCMR §5-E3018.1.

13. As noted by the U.S. Court of Appeals for the District of Columbia Circuit:

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)(internal citations omitted); *see also*, *Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) (“Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent’s desires.”) and *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (“Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”).

14. Although an inadequate IEP is a *necessary* condition for private school placement, it is not a *sufficient* condition for such placement. *N.T. v. District of*

Columbia, 839 F.Supp.2d 29 (D.D.C. 2012). If a public school could offer a FAPE, and the public agency has not demonstrated unwillingness or inability to modify the student's IEP, then a hearing officer may order a modification in the IEP rather than private school placement:

Because DCPS can craft an appropriate IEP to provide a FAPE, it is not required to pay for [the student's private] placement.

Id., citing *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) and *School Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985) ("*Burlington*").

Appropriateness of the Attending School and of the Non-Public School

15. A determination of the appropriateness of a special education placement requires consideration of at least the following factors: (a) the nature and severity of the student's disability; (b) the student's specialized educational needs; (c) the link between those needs and the services offered by the school/program; (d) the cost of the placement if it is a non-public school; and (e) the extent to which the placement represents the LRE for the Student. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005).

16. In the instant case, the Student's ADHD and SLD are so severe that he has made almost no academic progress, and has had continuing behavior difficulties, for years at the Attending School, despite specialized instruction, OT and counseling. *See*, Findings of Fact 87-89, 97, 101, 103, 105, 159, 160, 233-237, 239, 241, 243, 322-329, 332, 334, 337-340, 345, 358, 363, and 381.

17. The Student requires a separate special education day school with teachers who know how to teach children with SLD and ADHD. *See*, Finding of Fact 279.

18. Attending School cannot provide those services, and there is no evidence in the record that Respondent has another program or school that can.

19. Non-Public School can provide the services the Student needs. *See*, Findings of Fact 482-506.

20. The cost of Non-Public School has been set by OSSE. Finding of Fact 507.

21. The IDEA requires that special education be provided in the child's LRE:

To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §412(a)(5)(A); *accord*, DCMR §5-E3011.1; *see also*, 34 C.F.R.

§300.114(a)(2).

22. Because the Student, with the exception of half-day summer school during the summer of 2014 and the first two weeks of SY 2014-2015, has been repeatedly disruptive at school except when in a special-education classroom (*See*, Findings of Fact 87-89, 97, 101, 103, 105, 159, 160, 237, 239, 241, 243, 322-329, 332, 334, 337-340, and 345), a separate special education day school such as Non-Public School is the Student's LRE.³⁷

Compensatory Education

23. 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

³⁷ Non-Public School is located in the District of Columbia, which satisfies Respondent's order of priority among non-public placements. DC ST §38-2561.02(c).

F.3d 516, 521-24 (D.C. Cir. 2005) (“*Reid*”). 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.

24. In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005). Educational programs, including compensatory education, must be qualitative, fact-intensive, and “above all tailored to the unique needs of the disabled student.” *Id.*

25. 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.

26. 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).

27. The hearing officer must base a compensatory education award on evidence regarding the student's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.*

28. At the same time, Petitioner's failure to justify a specific award does not waive the student's right to compensatory education. *Id.*; *see also, Henry v. District of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010).

29. Because of the Student's ADHD, it is unreasonable to expect him to attend to more than one hour per weekday day of tutoring, or to benefit from tutoring on the weekend. Accordingly, the undersigned concludes that to remediate the academic deficits caused by the denial of FAPE, the Student should receive five hours per week of tutoring. That tutoring should begin after the Student has attended Non-Public School for a month, to allow time for his negative attitude toward learning to be improved and for him to be receptive to additional instruction. The tutoring should be completed by the end of SY 2015-2016, thus covering a period of approximately 96 weeks.

30. The undersigned concludes that two hours of compensatory OT per month (in addition to whatever OT services are provided on his IEP from time to time), beginning in October 2014 and continuing through June 2015 (a period of nine months) should restore the Student to the position he would have occupied if he had not missed the 22 hours of OT.

Summary

31. Since December 12, 2012, Respondent has denied the Student a FAPE because his IEPs (i) lacked PLOPs and goals tailored to his unique needs, (ii) provided insufficient hours of specialized instruction, (iii) failed to provide all of his instruction in the outside of general education setting, (iv) provided insufficient counseling services, (v) provided insufficient OT services, (vi) failed to provide transportation, and (vii) provided insufficient ESY services; and the IEPs therefore were not reasonably calculated to provide educational benefit.

32. Respondent denied the Student a FAPE by failing to implement his IEPs fully. Specifically, the shortfall of five hours of OT from September through December 11, 2012 and the shortfall of 17 hours of OT³⁸ during SY 2013-2014 constituted material failures to implement those aspects of the Student's IEPs. Shortfalls in services provided during other periods were not material.

X. ORDER

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

1. No later than September 22, 2014, Respondent shall revise the Student's IEP to provide that all of his instruction, lunch and recess shall be provided in the outside of general education setting.

2. No later than September 22, 2014, Respondent shall issue to Petitioner a Prior Written Notice ("PWN") or other documentation of the Student's Location of Services

³⁸ There also was a shortfall of 3.5 hours of behavioral support services during SY 2013-2014 but Petitioner did not seek compensatory behavioral support services.

("LOS"), placing and funding the Student's attendance at Non-Public School for School Year ("SY") 2014-2015 with transportation services.

3. The Student may begin to attend Non-Public School upon issuance of this Order if Non-Public School will permit him to attend before Respondent revises his IEP and issues the PWN or other LOS documentation referred to above, and if Petitioner is willing to transport the Student at her own expense until transportation services begin. Funding shall be retroactive to the Student's first day of attendance at Non-Public School.

4. No later than thirty (30) days after the Student begins attending Non-Public School, Respondent shall convene a meeting of the Student's IEP Team, with all necessary members, including Petitioner, at Non-Public School, to review and revise the Student's IEP and Behavior Intervention Plan as appropriate.

5. No later than October 15, 2014, Respondent shall provide documentation to Petitioner that Respondent will fund the following services as compensatory education for the denial of FAPE to the Student: (a) 480 hours of independent tutoring to be provided between November 1, 2014 and the first day of SY 2016-2017; and (b) 18 hours of independent occupational therapy to be provided between October 1, 2014 and the last day of SY 2014-2015.

6. No later than May 15, 2015, Respondent shall convene a meeting of the Student's IEP Team, with all necessary members, including Petitioner, at Non-Public School, to review and revise Student's IEP and Behavior Intervention Plan as appropriate and to determine his placement for the 2015-2016 school year.

7. No later than May 30, 2015, Respondent shall determine and advise Petitioner of the Student's LOS for SY 2015-2016.

8. If Respondent fails to advise Petitioner of the Student's LOS for the 2015-2016 school year by May 30, 2015, Non-Public School shall be the Student's placement and LOS for the SY 2015-2016, with transportation, funded by Respondent.

9. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

10. 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.

Petitioner's other requests for relief are DENIED.

Dated this 15th day of September, 2014.



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).