DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

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OSSE
STUDENT HEARING OFFICE

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: August 20, 2012

Hearing Officer: Jim Mortenson

Case No: 2012-0439

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on June 19, 2012. A response to the complaint was filed on June 26, 2012. A resolution meeting was convened on June 28, 2012, and resulted in no agreements because the Respondent merely proposed to do what it was required to do for the resolution meeting: "convene a meeting to discuss parent's concerns [and] review and revise the IEP[.]"[2] The 30 day resolution period was not adjusted and the 45 day hearing timeline began on July 20, 2012. A prehearing conference was convened by the undersigned on July 13, 2012, and a prehearing order was issued July 17, 2012.

[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.
[2] R 2, 34 C.F.R. § 300.510.

The Petitioner filed disclosures on July 30, 2012. The Respondent filed disclosures on August 6, 2012. Neither party filed a trial brief outlining the party's legal arguments and describing the evidence they intended to present and how that evidence would support their case including what documents would show or prove, as ordered in the July 17, 2012, prehearing order.

The hearing was convened at 9:15 a.m. on August 13, 2012, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Petitioner was represented by Donovan Anderson, Esq., and the Respondent was represented by William Jaffe, Esq. At the start of the hearing the Petitioner moved to have a witness testify via telephone. The reason was due to an emergency at the witness's home discovered upon her return on Sunday, August 12, 2012 (the home had been flooded which necessitated her being available for the insurance adjuster). This proffer was confirmed by the witness under oath and the witness was permitted to testify via telephone due to the nature of her circumstances, over the objection of the Respondent. (The Respondent argued that its witnesses should be permitted to testify via telephone because they are required to be in school buildings and classrooms. The Respondent did not present any witnesses, however.) The hearing concluded at1:00 p.m. The due date for this HOD is September 2, 2012. This HOD is issued on August 20, 2012.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is: Whether the Respondent has denied the Student a free appropriate public education (FAPE) when it has not proposed or provided him an individualized education program (IEP) reasonably calculated to enable him to be involved in and progress in the general education curriculum because the IEP lacks sufficient specialized instruction to address his academic needs and appropriate related services including therapeutic supports to address his behavioral needs?

The substantive requested relief at the time of hearing was placement at School, a non-public special education day school.

The Student's IEP is not reasonably calculated to enable him to be involved in and progress in the general education curriculum because it lacks sufficient specialized instruction to address his academic needs and appropriate related services including therapeutic supports to address his behavioral needs.

IV. EVIDENCE

Three witnesses testified at the hearing, all for the Petitioner. The Petitioner's witnesses were:

1) The Student's Step Father,
2) Dr. Joy Nagorniak, Psychologist (Admitted as expert in the areas of evaluation of children with disabilities and types of services for children with disabilities. (J.N.)
3) Admissions Coordinator, School.

All of the witnesses testified credibly.

Four exhibits were admitted into evidence of six disclosures from the Petitioner. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 1	May 30, 2012	IEP
P 2	April 2, 2012	Comprehensive Psychological Evaluation
P 3	May 30, 2012	Review of Independent Educational Evaluation
P 6	Undated	Curriculum Vitae of Joy Nagorniak

Four exhibits were admitted into evidence of the Respondent's six disclosures. The Respondent's exhibits are:

Ex. No.	Date	Document
R 2	June 28, 2012	[Student] RSM Notes
R 4	November 18, 2011	IEP Progress Report – Annual Goals
	March 30, 2012	[Behavior Intervention Plan]
R 5	June 13, 2012	Service Tracker
	June 5, 2012	Service Tracker
	May 7, 2012	Service Tracker
	March 29, 2012	Service Tracker
	January 5, 2012	Service Tracker
	December 5, 2011	Service Tracker
	November 7, 2011	Service Tracker
	October 5, 2011	Service Tracker
R 6	May 30, 2012	Prior Written Notice

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a year old learner with a disability who completed his grade year at Langdon Educational Campus.[3]
2. The Student has been identified and determined eligible for special education services under the definition of other health impairment (OHI).[4] The Student suffers from a mood disorder, anxiety disorder, attention deficit hyperactivity disorder/combined type, and reading and writing disorders.[5]
3. The Student's disabilities have resulted in low academic achievement and behavioral issues.[6] He is often off-task and inattentive, lacks motivation, leaves class without permission, cries, and disrupts others.[7] His grades have fluctuated over the last few years from As to failing.[8] In 2011 the Student scored at the basic level in both reading and math on the District of Columbia Comprehensive Assessment System (DC-CAS).[9]
4. A comprehensive psychological evaluation of the Student was conducted in March 2012, by J.N., to examine his intellectual, academic, and social-emotional functioning.[10] The Respondent's school psychologist reviewed J.N.'s comprehensive psychological evaluation in May 2012.[11] An IEP team meeting to review and revise the Student's IEP was then held on May 30, 2012.[12] A speech and language assessment was also reviewed at the meeting.[13]

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[3] P 1, P 3, Testimony (T) of C.C.
[4] P 1, P 3.
[5] P 2, P 3, T of J.N. (Despite his reading and math disorders, the Student has not been determined to meet the definition of specific learning disability under IDEA. This is not an issue in this case and presents no problem in terms of eligibility or services as the Student has been determined eligible for special education and related services, which is not in dispute.)
[6] P 2, T of J.N.
[7] P 2, T of J.N.
[8] P 3.
[9] P 3.
[10] T of J.N., P 2.
[11] P 3.
[12] P 1, R 6.
[13] P 1. (The report from the speech and language assessment was not introduced into the record and the Petitioner's complaint is focused on the recommendations in the reports at P 2 and P 3. The speech and language assessment was not fully complete due to the Student's refusal to cooperate.)

5. J.N. concluded that the Student's "difficulties are the result of a complex set of variables and dynamics, and therefore multimodal interventions are warranted."[14] J.N. recommended the Student be educated in a highly structured therapeutic setting with a class size of eight to ten students, a higher degree of supervision that received at Langdon, and emotional, behavioral and academic supports.[15] Such recommended supports included school-based counseling services consisting of individual therapy for 60 minutes per week and group therapy for 60 minutes per week.[16] An updated behavior plan to be implemented both at home and school was recommended, consisting of notice to Student of the expected behavior, frequent feedback about progress, and positive behavior reinforcement "with concrete and tangible rewards."[17] It was recommended the Student have a quiet place, free of distractions, to complete school work, that he study in small increments that can be reviewed and repeated frequently until he has mastered the subject and that he receive support, encouragement, and redirection while completing school work (including at home), with breaks as needed.[18] J.N. recommended the Student be provided with unspecified modified assignments to accommodate his poor attention span and limited ability to tolerate frustration, as well as extended time to complete assignments and tests.[19] It was recommended that the Student be provided specialized instruction in all academic areas that is appropriate to his skill level which, at the time of J.N.'s assessment, was reading in the middle third to middle fourth grade range, math in the early fifth to late sixth grade range, and writing in the middle third to late fourth grade range.[20] J.N. recommended that a structured approach to learning new

[14] P 2.
[15] P 2.
[16] P 2.
[17] P 2.
[18] P 2.
[19] P 2.
[20] P 2.

vocabulary words be employed with the Student and that he read 30 minutes per day at home to build his reading skills.[21] It was recommended that the Student be engaged in supervised recreational activities in order to help him appropriately structure his free time and that he would benefit from a mentor.[22]

6. The school psychologist, as recorded in the report of the review of the comprehensive psychological evaluation, recommended the Student receive counseling in the school setting and that a behavior intervention plan (BIP) continued to be implemented and reviewed.[23] She specifically recommended a "check-in system at school each day where [Student] checks-in with a school staff person such as a school counselor or school social worker to help him be ready for a productive school day." It was also recommended that the Student "verbally repeat directions, explanations, and instructions after they have been given to reinforce retention and check for understanding[,]" that he should take notes when directions are given following the "What, How, Materials, and When" format, that he make and create rebus stories, and make a vocabulary chart to display words used in different subject areas.[24] There were no disagreements with J.N.'s recommendations, other than an explanation why she felt the Student does not meet the definition of specific learning disability under IDEA.[25]

7. At the May 30, 2012, IEP team meeting, the vice principal and the school social worker both advised the team that the Student's behavioral functioning had improved, but without any specificity.[26] The Respondent provided no other explanation for the proposed or refused services, nor what was considered and rejected by the team and why.[27]

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[21] P 2.
[22] P 2.
[23] P 3.
[24] P 3.
[25] P 3.
[26] P 1.
[27] P 1, R 6.

8. The IEP proposed from the May 30, 2012 IEP team meeting included the following:[28]

   1) Nine academic goals, three each in the areas of reading, math, and written expression.
   2) Five functional goals in the area of emotional, social, and behavioral development, which are designed to address behaviors the Student uses to escape work and stressful situations and to be on-task and organized.
   3) Eight hours per week of specialized instruction, outside of the general education setting, in the area of reading.
   4) Five hours per week of specialized instruction, outside of the general education setting, in the area of written expression.
   5) Seven hours per week of specialized instruction, outside of the general education setting, in the area of mathematics.
   6) Four hours per month of behavioral support services, outside of the general education setting.
   7) The specialized instruction and behavioral support services would all be provided in "resource class" in which the maximum number of students is not specified.
   8) Supplementary aids and services to be provided in the classroom are: repetition of directions; reading of test questions in math, science, and composition; use of a calculator; tests in small groups; location with minimal distractions; breaks and extended time on subtests of tests; and travel training for the Metro.

9. Prior to the May 30, 2012, proposed IEP revision, the IEP was last reviewed November 4, 2011.[29] The goals from that IEP were not changed in the May 30, 2012 revision.[30]

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[28] P 1.
[29] P 1.

10. The math goals in the IEP are based on eighth grade math standards.[31]

11. The first reading goal combines analyzing literary components such as points of view of characters and effects such as suspense or humor from informational text, and so is not based on any educational standards or logic.[32] The second and third goals are so broad as to cover standards from fifth through seventh grade for one goal and fifth through twelfth grade for the other goal.[33]

12. The writing goals are vague and do not clearly represent the writing standard the Student is supposed to demonstrate (e.g. goal 1 could apply to fifth through 12th grade standards, goal 2 could apply to 10th or 12th grade standards, and goal 3 could apply to seventh or eighth grade standards, although it is not at all clear which ones.)[34]

13. The May 30, 2012, revision to the IEP was based on the speech and language assessment and psychological assessment.[35]

14. It is unknown where the Respondent will send the Student to school in the fall of 2012-13.[36]

15. The Petitioner sought out and obtained the Student's acceptance at School in July 2012.[37] School is a non-public special education day school for students with disabilities who require on-going therapeutic support, particularly those with significant social/emotional needs.[38] The School measures student academic progress based on the

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[30] P 1, R 4. (Because the prior revision of the IEP was not presented, only progress reports and service trackers, it is unknown exactly what and how much specialized instruction, related services, and supplementary aids and services were required prior to the May 30, 2012 IEP proposal.
[31] P 1 (D.C. Reading Standards 8.PRA.6, 8.NSO-N.5, and 8.DASP.4.)
[32] P 1, (D.C. Reading/English Language Arts Standards).
[33] P 1, (D.C. Reading/English Language Arts Standards).
[34] P 1, (D.C. Reading/English Language Arts Standards).
[35] R 6.
[36] T of C.C.
[37] T of C.C., T of A.R.
[38] T of A.R.

District of Columbia education standards.[39] Teachers at the School are certified in both an academic content area and special education.[40] Individual and group therapy services are provided at the School.[41] A positive behavior incentive program is used with students at the School.[42] After reviewing the Student's records, including the May 30, 2012, revision of the IEP, recent evaluation reports, and interviewing the Student, the admissions director determined the School could meet the Student's needs.[43] The annual tuition at the School is plus related services expenses.[44]

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

[39] T of A.R.
[40] T of A.R.
[41] T of A.R.
[42] T of A.R.
[43] T of A.R.
[44] T of A.R.

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

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

34 C.F.R. § 300.17. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1).

3. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See:* 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006). "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see* Reid v. District of Columbia, 401 F.3d at 519-20; the nature and effects of the child's disability have not been adequately monitored, *see* Harris v. District of Columbia, 561 F. Supp. 2d at 68; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See* Gellert v. District of Columbia Public Schools, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006)." Suggs v. District of Columbia, 679 F. Supp. 2d 43, 53 IDELR 321 ((D.D.C.2010). An IEP is developed or revised based on data from, typically, various sources such as assessments, class work, teacher and staff observations, and parent information, among other things. 34 C.F.R. §§ 300.324, 300.503.

The data upon which proposals and refusals are based must be documented in a written notice to the parents. 34 C.F.R. § 300.503.

4. Federal regulations at 34 C.F.R. § 300.320 lists the required contents of an IEP:

> (a)(1) A statement of the child's present levels of academic achievement and functional performance, including—
> (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
> (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
> (2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
> (A) 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
> (B) Meet each of the child's other educational needs that result from the child's disability;
> (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
> (3) A description of— (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
> (ii) 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;
> (4) 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 to enable the child —
> (i) To advance appropriately toward attaining the annual goals;
> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
> (5) 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 paragraph (a)(4) of this section;
> (6)(i) 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 612(a)(16) of the Act; and
> (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
> (A) The child cannot participate in the regular assessment; and
> (B) The particular alternate assessment selected is appropriate for the child; and
> (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

5. The IEP in question here, proposed May 30, 2012, does not reflect the data reviewed at the IEP team meeting. The annual goals were not changed, presumably because they had not yet been met and were still within the annual period within which they were expected to be met. The services to reach those goals, however, do not reflect the services recommended in the

evaluation reports reviewed by the team. Further, there were no competing or differing recommendations for services to assist the child in reaching the goals from which the IEP team had to choose or consider. Both J.N. and the school psychologist made specific recommendations for specialized instruction and services for the Student. The IEP included eight hours per week of specialized reading instruction, five hours per week of specialized writing instruction, and seven hours of specialized math instruction, all outside of the general education setting. The instruction is to be provided in a resource room, but size of the classroom population is not specified, and the only data available to the team shows the Student required a classroom population of eight to ten students. Neither the IEP, the written notice of the proposal, or the meeting notes provide any explanation for why the Student would be provided only 20 hours of specialized instruction during the week, when the data discussed by the team showed he required specialized instruction on a full-time basis (at least 25 to 30 hours per week). Furthermore, the IEP required four hours per month of behavioral support services. The recommendations to the IEP team included several items, including: individual therapy for one hour per week and group therapy for one hour per week, a BIP specifying the desired behavior, that feedback to the Student about progress and positive reinforcement with concrete and tangible rewards would be provided, and that a check-in system for the Student with school staff be employed daily. The IEP included none of these things and there was no explanation in the record showing why the Respondent proposed just four hours of unspecified behavioral support services to address the Student's behavioral needs. Furthermore, there is no explanation why the unspecified behavioral support services would be provided in a resource class, four hours per month, when the only data available to the team and documented was that both individual and group counseling was necessary to

meet his needs for two hours every week (about 8 hours per month). It is reasonable to assume group counseling could be provided in the resource class, but it is not clear that individual counseling would be provided there. Finally, the recommended services, including the check-in system, and the specific components of the BIP were not included in the IEP, and there was not any explanation about the consideration of those elements (which would have been documented in the written notice or, at a minimum, in the meeting notes). There is also no indication why the proposed IEP did not include the recommended remedial instruction due to the Student's assessed levels in reading, writing, and math. The IEP did include some of the recommended supplementary aids and services for the classroom, such as repetition of directions and a location with minimal distractions, among others. There is no explanation in the record of why these recommendations were adopted and others rejected, such as the specified note-taking and the making and use of a vocabulary chart. Thus, the Petitioner has shown the May 30, 2012, proposed IEP is not reasonably calculated to enable the Student to be involved in and progress in the general education curriculum.

6. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). When considering prospective nonpublic placement as a remedy, the following factors must be considered: a) the nature and severity of the Student's disability; b) the Student's specialized educational needs; c) the link between those needs and the services offered by the private school; d) the reasonableness of the placement's cost; and e) the extent to which the placement represents the least restrictive environment. Branham v. District of Columbia, 427 F. 3d 7, 12, 44 IDELR 149, ___ (pdf pg. 5) (D.C. Cir. 2005). "Because placement decisions implicate equitable considerations, moreover, courts may also consider

the parties' conduct." Id., *citing* Reid v. District of Columbia, 401 F.3d 516, 524, 43 IDELR 32, ___ (D.C. Cir. 2005).

7. In this case, the evidence available to the IEP team and the undersigned shows the Student has multiple disabilities which impact him both functionally and academically. He requires a school setting that has full-time therapeutic supports and he requires significant remedial instruction in order to be able to be involved in and progress in the general education curriculum. School can address his functional needs with its therapeutic supports. The School accepted the Student based on review of both P 1 and P 2, and so it is reasonable to conclude it will address his remedial needs. The school costs per year plus related service costs. No evidence refuting the reasonableness of this amount was presented. Further, the Respondent had not even identified a school of its own where the Student might attend for the 2012-13 school year that could be compared to Foundations. With revisions to the IEP consistent with the recommendations in the evaluation reports that require full-time specialized instruction and related services outside of the general education setting, the placement will be consistent with the IEP and the least restrictive environment for the Student. School is an appropriate prospective placement for the 2012-2013 school year for the Student.

VII. DECISION

The Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose or provide him an IEP reasonably calculated to enable him to be involved in and progress in the general education curriculum because the IEP lacks sufficient specialized

instruction to address his academic needs and appropriate related services including therapeutic supports to address his behavioral needs.

VIII. ORDER

1. The Student will be placed at the School for the 2012-2013 school year at the Respondent's expense, including transportation to and from school.
2. The Student's IEP will be revised, with the IEP team consisting of, at a minimum, the Petitioner, Student, a qualified representative of the Respondent, a regular education teacher, and at least one of the Student's special education teachers from (who must be invited). The IEP team meeting must occur no later than September 21, 2012. The IEP must be revised to address the services recommended in P 2 and P 3, the findings of this HOD, and any other matters determined necessary by the IEP team. All recommendations must be considered and documented in a notice in accordance with 34 C.F.R. § 300.503.

IT IS SO ORDERED.

Date: August 20, 2012

Jim Mortenson, Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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