DC Office of the State Superintendent of Education

Office of Review & Compliance
Student Hearing Office
1150 5th Street, S.E.
Washington, D.C. 20003

CONFIDENTIAL

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STUDENT HEARING OFFICE
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STUDENT[1], by and through Student's Parent Petitioners, v. DCPS Respondent.	HEARING OFFICER'S DETERMINATION Case No: 2012-0551 Representatives: Michael Eig and William Jaffe Impartial Hearing Officer: Joseph Selbka

I. Introduction and Procedural Background

Before the undersigned is a complaint filed by Parents on behalf of their son, Student.

1. Student is a [redacted] who is eligible for special education and related services from the District. No party challenges Student's eligibility for special education. This hearing request occurred when Parents challenged the District's proposed IEP and proposed transfer from Student's Current LOS.

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

2. On August 13, 2012, Parent filed the instant complaint. DCPS filed a response on August 29, 2012, and an amended response on October 2, 2012, after several motions and orders requiring such a response.

3. On September 6, 2012, the parties conducted an initial resolution conference where no issues were resolved. The parties never waived the resolution timeline and worked on settling the matter until the resolution period expired.

4. On September 4, 2012, the undersigned held a prehearing conference.

5. On September 9, 2012, the undersigned served a prehearing order on the parties. No party objected to the contents of the prehearing order, and thus it is binding on the parties pursuant to the language of the order. At the prehearing conference, the parties agreed that a final decision would be due on October 27, 2012.

6. Both parties timely provided their proposed exhibits to one another, and at hearing, neither party had any objections to the other party's marked exhibits. Thus, at hearing, the undersigned admitted Parent Exhibits ##1-124 without objection and District Exhibits ##1-6 without objection.

7. At the hearing, Parent called the following witnesses: Educational Advocate. The District called the following witnesses: DCPS Progress Monitor.

II. Issues to Be Decided

8. The issues to be decided in this hearing are as follows:

Issue #1- Whether DCPS failed to provide FAPE by failing to design and appropriate IEP. Specifically, Petitioner contends Student needs a full-time self contained classroom with a specific methodology which can only be provided by Commonwealth Academy in order to obtain FAPE.

Issue #2- Whether the District failed to propose a location of services capable of implementing Student's IEP; and relatedly, whether the District changed Student's placement by failing to propose an appropriate location of services to implement Student's IEP.

Issue #3- Whether Commonwealth Academy is the only appropriate location of services for Student to receive FAPE.

The Parent seeks prospective relief only. The District argues that it complied with the law in every way and that a transfer of Student is necessary to comply with IDEA.

III. Jurisdiction

9. The due process hearing was held and a decision in this matter is being rendered, pursuant to 20 U.S.C.A. 1400 et seq., and its implementing regulations, 34 CFR 300 et seq. and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

IV. Findings of Fact

Student's Disabilities and Their Effects on Student's Education

10. Student has a hearing impairment, a mood disorder (P.Ex. 76, #3). Student's hearing impairment and mood disorder interact in problematic ways (P. Ex. 76, #10). Student has problems with working memory deficits, motor coordination deficits, and written expression deficits (P. Ex. 76, #10). Student also has significant problems with anxiety especially as a result of attending school. (*Id.*) Student also requires environmental accommodations because of his hearing problems (*Id.*). Student's hearing loss has caused him to feel anxious around his peers (P. Ex. 76, #11). Moreover, as Student becomes overly emotional, his ability to process academic information becomes more pronounced (P. Ex. 27).

11. Student also has deficits related to executive functioning, organizational skills, and concentrating in the classroom (P.Ex. 76, #10). Although the extent of Student's deficits in this area is disputed (Compare DCPS Monitor Testimony with Educational Advocate Testimony), the District clearly views the executive functioning and organizational deficits as requiring accommodation (See R2-7). Therefore, in light of the District's actions in accommodating Student in ways to ameliorate executive functioning and organizational deficits, the undersigned makes a credibility finding in favor of Educational Advocate that Student has serious executive functioning and organizational deficits.

12. Because of Student's anxiety, he has problems with transitions, especially around school transfers (Educational Advocate Testimony, P. Ex. 27). Student's anxiety can cause him to shut down or have difficulty completing academic tasks (*Id.*). Student could even regress if the shock of a transition causes too much anxiety for him (Educational Advocate Testimony).

Student's Current Location for Services and History at the Current LOS

13. Student is a [redacted] who is classified as OHI. His current location of services is Current LOS and has been attending Current LOS for the 2012-2013 school year. Although the District has proposed to change the location of Student's placement, the District has maintained the location of services during the course of these proceedings (DCPS Progress Monitor Testimony).

14. Student has been at Current LOS since prior to the 2010-2011 school year (DCPS Progress Monitor Testimony).

15. For the 2010-2011, school year, Student was placed at Current LOS by another hearing officer's HOD (P. Ex. 78). After the 2010-2011 school year, the District placed Student at Current LOS as his location of services (DCPS Progress Monitor Testimony).

16. After the 2010-2011, school year, Current LOS along with the District conducted an annual IEP review (DCPS Progress Monitor Testimony). Current LOS was responsible for recommending Student's present levels of performance, baselines, and goals and objectives of the proposed IEP. (DCPS Progress Monitor Testimony). Current LOS complied and aided in creating a proposed IEP for the 2011-2012 school year (DCPS Progress Monitor Testimony).

17. The District then placed Student at Current LOS as student's location of services for the 2011-2012 school year (DCPS Progress Monitor Testimony).

18. Current LOS did not implement Student's 2011-2012 IEP in a variety of ways (DCPS Progress Monitor Testimony).

19. The teachers at Current LOS were not aware of Student's IEP and many teachers were not aware of Student's IEP (DCPS Progress Monitor Testimony). Student's teachers are not certified special education teachers (DCPS Progress Monitor Testimony).

20. The parties agree that Current LOS did not even attempt to provide Student with FAPE according to the goals and objectives set forth in the 2010-2011 IEP (Parent Counsel Closing Argument Admission, DCPS Progress Monitor Testimony). Moreover, because of a lack of measuring Student's progress, the goals and objectives were exactly the same in the 2011-2012 IEP as in the 2010-2011 IEP (DCPS Progress Monitor Testimony).

21. Current LOS does not have related services providers on staff in multiple areas (DCPS Progress Monitor Testimony). For this reason, Parent was forced to waive behavioral services for Student (DCPS Progress Monitor Testimony).

22. Current LOS does not have any 100% out of general education placements (DCPS Progress Monitor Testimony). Student is educated with nondisabled peers who do not have IEPS and are not eligible for special education (DCPS Progress Monitor Testimony).

23. Current LOS has consistently failed to provide Student with "pull out" services as set forth in the 2011-2012 IEP (DCPS Progress Monitor Testimony).

24. Current LOS has failed to comply with the District's record keeping requirements and has not been keeping track of provision of related services (DCPS Progress Monitor Testimony). The District requires all schools to keep track of implementation of each disabled student's IEP and related services (DCPS Progress Monitor Testimony). Current LOS was so behind on providing records to the District, that no one at Current

LOS could even remember the password to the District's computerized recordkeeping system (DCPS Progress Monitor Testimony).

25. Current LOS failed to prepare a plan to transition Student into a less restrictive environment in violation of District requirements that schools at least try to integrate all disabled students to the extent appropriate into the general education curriculum (DCPS Progress Monitor Testimony).

26. Because of the numerous violations of state standards, District requirements, and the continued failure to comply with the terms of Student's IEP, the District replaced Current LOS as Student's location of services (DCPS Progress Monitor Testimony).

27. Other than the small classes, small school size, and Student's familiarity with the program, Parents provided no evidence why Current LOS has a unique methodology which Student needs to obtain FAPE. Specifically, Parents provided no evidence that Current LOS' curriculum or milieu cannot be replicated at a different location. Parent did show that Current LOS is providing Student with accommodations and strategies which are designed to provide Student with an educational benefit (Educational Advocate Testimony, P. Ex. 76, #9). However, there was no evidence that another school which complies with state standards and which complies with Student's IEP couldn't provide Student with an educational benefit in the way Current LOS provides Student with an educational benefit- provided Student's problems with transitions could be accommodated.

The Proposed IEP at Issue, The IEP Design Process, and the District's Proposed Location of Services.

28. The District convened an IEP meeting on May 3, 2012 (R2-1a). Representatives from Current LOS and the District were at the meeting as well as Student's Parents (DCPS Progress Monitor Testimony).

29. The IEP Team proposed an IEP which placed student inside a general education classroom for approximately 12.5 hours per week with accommodations and supports (DCPS Progress Monitor Testimony, R2-7).

30. The IEP Team proposed an IEP which provided Student with 15 hours per week of out of general education services (DCPS Progress Monitor Testimony, R2-6).

31. The District determined that Student's new location of services would be Easter High School (DCPS Progress Monitor Testimony).

32. The Parents and the Current LOS staff objected to the new District IEP contending that several aspects of the program and physical location of Current LOS are necessary for Student to receive FAPE (Educational Advocate Testimony).

33. The District members of the IEP Team decided that Student did not need a full time placement based upon his progress at Current LOS (all of which was achieved in a 100% inside general education environment); his grades, course work; teacher reports, parent reports, classroom observations by DCPS Progress Monitor; his behavioral record; previous formal assessment; and the previous HOD (DCPS Progress Monitor Testimony, R4-1).

34. The District members of the IEP Team did not take into account in determining Student's new IEP and location of services: how Student's disability might prevent him from receiving FAPE in a large, noisy school building; how Student's disability might prevent him from receiving FAPE because of the transition from Current LOS to a new location of services; and how the accommodations built into Current LOS' program might be necessary to allow Student to receive FAPE (DCPS Progress Monitor Testimony). Rather, the IEP Team assumed that because Student could thrive in one general education classroom, Student could thrive in any general education environment (DCPS Progress Monitor Testimony).

35. Current LOS has a small student-teacher ratio (Educational Advocate Testimony). Student is educated in classes with approximately 10 students, and is a small school with approximately 100 students (Educational Advocate Testimony).

36. Student also has relationships with the students and staff of the Current LOS which will be difficult to replicate given the nature of Student's disability (Educational Advocate Testimony).

V. Conclusions of Law

Burden of Proof and Authority of Hearing Officers

37. The burden of proof lies with the party filing the due process complaint in a special education administrative hearing. *Schaffer v. Weast* 546 U.S. 49 (2005). In this case, the burden of proof lies with the Student.

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

39. In regard to the burden of proof in a special education proceeding, the Supreme Court has held that the ultimate burden of persuasion lies with the party filing the due process complaint. *Schaffer v. Weast* 546 U.S. 49 (2005). Parents must prove their case by a preponderance of the evidence. However, once a parent has proven a denial of

FAPE, the parents have met their burden. *Henry v. District of Columbia,* 55 IDELR 187, 750 F.Supp.2d 94 (D.D.C. 2010). At that point, the hearing officer must provide the student with an individualized remedy to make the student whole for the denial of FAPE. *Id.*

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

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

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

43. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Bray v. United States,* 306 F.2d 743 (D.C. Cir. 1962); *Dell v. Department of Employment Services,* 499 A.2d 102 (D.C. Ct. of App. 1985). Hearing officers can make reasonable inferences from the evidence adduced at hearing. *Dell, supra.* However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Charles v. Astrue,* 2012 WL 1194707 (D.D.C. 2012).

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

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

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

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

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

In administrative litigation, the hearing officer must be concerned with not only ensuring a fair process wherein the parties can present evidence, but also a proper result under the law because there is a significant public interest in properly having the law carried out. Landis, John, "*The Administrative Process*," Yale University Press (1938) excerpted in Foundations of Administrative Law, Schuck, Peter (ed.) Foundation Press (2004), pp. 13-14. For this reason, administrative hearing officers are constitutionally permitted to depart from the adversarial model and independently obtain evidence and develop an administrative record while remaining a neutral and impartial decision maker. *Sims v. Apfel,* 530 U.S. 103, 110-11 (2000); *Richardson v. Perales,* 402 U.S. 389, 400-401 (1971) (social security administrative law judges constitutionally permitted to develop the record to determine all facts necessary whether benefits should be granted under law).

Conclusions Related to IEP Design and Revision

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

the District only needs to provide a program designed to produce substantial educational progress. *Id.*

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

51. A hearing officer need not accept school district claims as true regarding the reasonableness of IEP design, but neither should the hearing officer substitute his/her judgment for that of the school officials who have designed the IEP. *School District of the Wisconsin Dells v. Z.S.,* 295 F.3d 671, 37 IDELR 34 (7th Cir. 2002). The hearing officer determines reasonableness, not, what in a hearing officer's judgment, would be the best placement for a student. *Id.*

52. When a child with emotional and psychological disabilities may be harmed from the effects of a transfer, it is imperative that the district consider the unique needs of the child and the effects of the transfer in designing the student's IEP and placement, and determining the student's location of services. *McKenzie v. Smith,* 771 F.2d 1527, 1532 (D.C. Cir. 1985); *see also Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990); *Holmes v. District of Columbia,* 680 F.Supp. 40 (D.D.C. 1988).

53. In determining placements, outside medical providers are not entitled to simply prescribe special education placements. *Marshall Joint School District No. 2. v. C.D. ex rel Brian D.,* 616 F.3d 632, 638-642 (7th Cir. 2010) (medical doctors not entitled to prescribe special education), and *M.B. v. Hamilton Southeastern Schools,* 58 IDELR 92, 668 F.3d 851 (7th Cir. 2011)(psychologist opinions, while important are not equal to that of teachers or other professional educators as psychologists are generally not trained educational professionals). However, a hearing officer can and should consider whether the medical professionals' descriptions of manifestations and symptoms of disabilities require a different finding than the IEP Team ultimately came to. *Id.* For this reason, the recommendations from Student's psychiatrist (P. Ex. 27) are important evidence but not dispositive as to the propriety of Student's special educational placement.

Law of Appropriate Services of Location, Change of Placements and Failure to Implement an IEP

54. In general, a school district has administrative discretion as to the location where children with disabilities will attend school. *Concerned Citizens and Parents for Continuing Education at Malcolm X School (PS 79) v. New York Board of Education,* 629 F.2d 751 (2nd Cir. 1980) *cert denied,* 449 U.S. 1078. Moreover, a school district has discretion to close down any of its schools for any reason and the closing of the school

will ordinarily not amount to a change in placement for the students previously attending the school. *Id.*

55. However, a change in location may constitute a change in placement if the location would result in a fundamental change in the IEP or the change in location would result in the elimination of a significant aspect of the IEP (because the IEP cannot be implemented at the school district's new proposed location). *Lunceford v. District of Columbia Board of Education,* 745 F.2d 1577, 1582 (D.C. Cir. 1984); *Savoy v. District of Columbia,* 112 LRP 8777 (D.D.C. 2012).

56. Even if there is no change in placement, a student can be denied FAPE because a change in location resulted (or in this case, will result) in a material failure to implement the Student's IEP. *Savoy v. District of Columbia, supra, See also, Van Duyn ex rel. Van Duyn v. Baker School District 5J,* 502 F.3d 811 (9th Cir. 2007) and *Houston Independent School District v. Bobby R.,* 200 F.3d 341 (5th Cir. 2000).

57. There are exceptions to the general rule that the district has administrative discretion to choose a location for provision of special education. Specifically, if: (1) a district changes a location for a student mid-year; (2) a district changes a location in the last year of high school; or (3) a student would be harmed by a change in location—then a parent/student can require the district to keep a student in a specific location. *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990); *Holmes v. District of Columbia,* 680 F.Supp. 40 (D.D.C. 1988); *Z.W. v. Smith,* 210 Fed.Appx. 282 (4th Cir. 2006). In such cases, a hearing officer has discretion to find the proposed location of services inappropriate based upon the harm of the transfer. *Id.*

58. However, these exceptions only apply if the original location of services can appropriately implement the Student's placement and provide the student with FAPE. In *Z.W.* the parents' argument challenging the change in location was premised on the original location being appropriate to implement the student's IEP. *See* 210 Fed.Appx. at 287. In *Block,* the District Court affirmed the hearing officer's HOD based upon a factual finding that the student's initial location was appropriate to implement the Student's IEP. *Block,* 748 F.Supp. at 897. In *Holmes,* the District Court specifically found that the student's initial location was appropriate to implement the student's IEP. *Holmes,* 680 F.Supp. at 42.

59. Therefore, the undersigned holds that, in order for Student to invoke the exceptions set forth above, the original location has to be able to implement Student's IEP and provide Student FAPE (a free appropriate public education) moving forward. To hold otherwise would require a school district (and a hearing officer) to keep a student in an inappropriate placement in violation of IDEA. This cannot be the law. See *Forest Grove School District v. T.A., supra*—the purpose of due process hearing review is to provide relief so that a student will receive FAPE.

Conclusions of Law Related to Provision of FAPE at Current LOS

60. In order to provide a student FAPE, a school has to meet SEA standards (usually state educational standards, but, in this case, the educational standards set forth in the law of the District of Columbia by the Office of the State Superintendent of Education ("OSSE")). 20 U.S.C.A. 1401(9); *Winkelman v. Parma City School District,* 550 U.S. 516 (2007). *See also Rowley v. Board of Education of Hendrick Hudson Central School District, Westchester County,* 458 U.S. 176, 203 (1982) (in order to provide FAPE, a district has to meet the "definitional" requirements of FAPE set forth in the statute).

61. OSEP requires the SEA to establish and maintain qualifications so as to ensure that all teachers providing instruction to children with disabilities are highly qualified and trained. 34 CFR 300.146(b); 34 CFR 300.156(a).

62. OSSE has complied with the federal regulations, and requires at least one instructor at Current LOS for every class that teaches Student to be a certified special education teacher in the state where the school is located. 5A DCMR 2823.2. Virginia, where Current LOS is located, requires special education students to be taught by certified special education teachers. 8 VAC 20-81-40.

63. State standards also require special education and services be provided in accordance with the Student's IEP, 5-A28 DCMR 2805.1, 2808.3; that students have a complete and accurate IEP, 5-A28 DCMR 2808.1; that all data is entered into SEDS and up to date, 5-A28 DCMR 2802.1; that all IEPs comply with federal law, 5-A28 DCMR 2808.7; monitor progress on goals, 5-A28 DCMR 2808.9; and that the school have a plan for transitioning students to a less restrictive setting, 5-A28 DCMR 2810.1.

64. In order to provide a student FAPE, IDEA also requires a school to provide services in conformance with the student's IEP. 20 U.S.C.A. 1401(9). However, courts have generally required only substantial conformance with the student's IEP to provide a student with FAPE. *See e.g. Savoy v. District of Columbia,* 58 IDELR 129 (D.D.C. 2012); *See also Sumter County School District 17 v. Heffernan,* 642 F.3d 478 (4th Cir. 2011); *Van Duyn v. Baker School District 5J,* 502 F.3d 811, 822 (9th Cir. 2007); *Neosho R-V School District v. Clark,* 315 F.3d 1022, 1027, nt. 3 (8th Cir. 2003); *Houston Independent School District v. Bobby R,* 200 F.3d 341, 349 (5th Cir. 2000).

65. Contrary to Parents' claims in closing argument, the fact that a private school is given a certificate of approval from OSSE does not relieve the private school of its responsibilities to follow the DCMR. 5-A28 DCMR 2801.3. Moreover, an OSSE certificate cannot make a private school appropriate for every special education student because of the nature of special education. Special education must be provided in a way which addresses a student's unique needs, strengths, and weaknesses. *McKenzie v. Smith,* 771 F.2d 1527, 1532 (D.C. Cir. 1985). It would thus be impossible for OSSE to predetermine that a specific location of services could provide every eligible child with a disability with FAPE. *Id.*

Conclusions Related to the Importance of the Components of an IEP

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

67. Thus, in order to provide substantive FAPE, an IEP must establish goals which respond to all significant facets of a student's disability, both academic and behavioral. *Sarah D., supra.* An IEP that lacks meaningful educational goals is likely to be fatally defective. *Susquentia School District v. Raelee S,* 25 IDELR 120 (M.D. Pa. 1996). It is very difficult (and nearly impossible) to appropriately address a student's needs without first defining the goals which will provide a reasonable educational benefit. *Conemaugh Township School District*, 23 IDELR 1233 (SEA PA 1996).

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

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

70. In light of the above stated conclusions of law, the undersigned holds that a complete failure to follow the Student's IEP including goals and objectives constitutes a material violation of the IEP and a denial of FAPE.

VI. Discussion (Application of Law to Fact)

71. The undersigned finds that the District failed to reasonably design an IEP and placement for Student in May, 2012. Specifically, the District failed to consider the

unique needs of the Student in transferring from Current LOS to another location of services. The undersigned does not find that Parents proved Current LOS has a specific methodology which only Current LOS can implement. Rather, the District's IEP is not reasonably calculated to provide Student FAPE in that the District failed to take into account Student's unique needs and how such needs might manifest when Student transfers from Current LOS to Student's new location of services. As such, the District's proposed IEP is not reasonably calculated to provide Student with an educational benefit and not designed to provide Student FAPE.

72. The undersigned finds that, in order to design an IEP in May, 2012, reasonably calculated to provide Student with FAPE, the IEP Team must consider: (1) how transition to a new location will affect Student's learning; (2) the effect of a new physical location on Student; (3) the effect of Student's anxiety and other disabilities on his educational performance in light of a transfer; (4) whether the composition of the student body or the physical layout of a new location will affect the provision of FAPE to this Student; and (5) any other aspects of Student's disability and how a transfer will affect Student presented by Parents or their experts and advocates.

73. The undersigned finds that the District chose a location of services capable of implementing the IEP proposed by the District in May, 2012, and that said location of services would not be a change of placement. However, this issue is largely moot because the undersigned found the design of the proposed IEP defective as set forth above.

74. The undersigned finds that Current LOS is not an appropriate location of placement for Student as it does not use certified special education teachers for its classes; does not generally follow state standards in the ways set forth above; and does not provide services in accordance with the Student's IEP. As such, Current LOS cannot provide Student with FAPE and must be considered inappropriate.

75. As such, the District is entitled (and, indeed required) to transfer Student from Current LOS to an appropriate location of services for placement. However, in order to provide Student with a new location, the District (through its representatives on the IEP Team and through a properly revised IEP) has to address any implications to Student's learning and the implementation of Student's IEP which arise from the change of location.

76. As the District did not take into account Student's unique needs in transitioning from Current LOS to a new location of services, the District must first do so prior to transferring Student. This will, in all likelihood, require a revised IEP (and may require a revised LRE determination and location of services depending on how the IEP Team ultimately chooses to addresses Student's issues with transitions to different environments).

77. The Parents have met their burden that the District's May 3, 2012, IEP was not reasonably calculated to provide Student with FAPE. The Parents have failed to meet their burden on the other issues

VII. Order

78. The IEP Team's actions in not considering the effects of Student's disability in transitioning to a new location when designing Student's new IEP constitute a denial of FAPE.

79. The District shall not effectuate a transfer to Eastern High School at this time. Student shall remain at Commonwealth Academy until the District can: (1) convene an IEP meeting; (2) revise Student's IEP; and (3) determine Student's new location of services. The District shall fund Student's attendance at Commonwealth Academy until the District can effectuate a transfer in accordance with this order.

80. Within 30 calendar days of this order, the IEP Team shall meet. The IEP Team must determine the effects of transitioning Student to the new location of services. As such, the IEP Team shall determine what accommodations and other services Student needs to transition to Student's new location of placement. In making this determination, the IEP Team shall consider the following factors: (1) how transition to a new location will affect Student's learning; (2) the effect of a new physical location on Student; (3) the effect of Student's anxiety and other disabilities on his educational performance in light of a transfer; (4) whether the composition of the student body or the physical layout of a new location will affect the provision of FAPE to this Student; and (5) any other aspects of Student's disability and how a transfer will affect Student presented by Parents or their experts and advocates at the IEP meeting.

81. The IEP Team shall adopt all accommodations and/or additional services necessary to ameliorate any deficits to Student's learning caused by the transfer to a new location. Student' IEP shall be revised and amended to include all such accommodations and/or additional services. After determining how to address the transition effects on Student due to a transfer, the IEP Team shall then determine an appropriate LRE and location of services for Student.

82. The IEP Team shall only consider Commonwealth Academy as a possible location of services for Student if the IEP Team can verify that, as of the date of the IEP meeting: (1) Commonwealth Academy can and will implement the terms of Student's IEP- including having properly certified teachers teach every class that Student attends; and (2) Commonwealth Academy can and will provide Student with educational services which comport with state standards related to the provision of special education of Student.

83. Parents other requests in their due process complaint are denied.

Dated this 27th day of October, 2012.

/S Joseph P. Selbka
Joseph Selbka, Esq.
Hearing Officer

NOTICE OF APPEAL RIGHTS

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