DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

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

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: November 20, 2012

Hearing Officer: Jim Mortenson

Case No: 2012-0632

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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on September 11, 2012. A response to the complaint was filed on September 20, 2012. A prehearing conference was held, via telephone, on September 24, 2012, and a prehearing order was issued on that date. A resolution meeting was held on September 27, 2012, and resulted in no agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on October 12, 2012.

During the prehearing the Petitioner raised a concern about access to the Student's educational records. The Respondent agreed to provide the Petitioner with a set of educational records at the resolution meeting. This was recorded in the prehearing order, as well as

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

instructing the parties what to do if records were not provided as agreed to. The undersigned was not informed of any further problems with access to educational records.

Both parties exchanged disclosures on November 5, 2012, and the Respondent filed its trial brief with the undersigned on that date. The Petitioner filed her trial brief on November 8, 2012.

The Petitioner filed a motion, on November 5, 2012, to permit two witnesses, [redacted] and [redacted], to testify via telephone at the hearing to be held on November 13, 2012. The motion was supported by affidavits from each of the witnesses. No objection to the motion was filed by the Respondent. The motion was granted as to both witnesses by order issued November 9, 2012. At the hearing, one of the witnesses, [redacted] was not at her home in Manassas, Virginia, as she had sworn she would be in her affidavit, with "back to back clients that [she was] seeing on [November 13, 2012] in addition to several evaluations that need to be completed[,]" which meant she could not take the estimated four hours to travel to Washington, D.C. to testify in person. Rather, the witness was in Washington, D.C., where the Petitioner's Counsel contacted her by telephone to testify. Thus, because the good cause to permit telephone testimony from this witness no longer existed, she was advised to come to the hearing to testify in person. The witness was not presented by the Petitioner in person and did not testify.

The hearing was convened approximately 9:00 a.m. on November 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 Kiran Hassan, Esq., and the Respondent was represented by Maya Washington, Esq. The hearing concluded at approximately 4:00 p.m. The due date for this HOD is November 25, 2012. This HOD is issued on November 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. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

(1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it refused to include extended school year (ESY) services in the Student's individualized education program (IEP) proposed May 14, 2012, for the summer of 2012?

(2) Whether the Respondent denied the Student a FAPE when it failed to propose or provide an IEP reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP proposed May 14, 2012, does not include specialized instruction and related services to be provided entirely outside of the regular education environment necessitating a more restrictive educational placement?

The substantive requested relief at the time of hearing was:

- Compensatory education for missed ESY services consisting of 20 hours of reading tutoring, 20 hours of math tutoring, 20 hours of writing tutoring, and 8 hours of counseling.[2]

[2] Surprisingly, the Petitioner did not present evidence clearly supporting this requested relief. Rather, the Petitioner presented a plan for over 300 hours of services that was not based on the missed ESY services, but rather on evaluations that took place up to a year prior to the summer of 2012, assertions the IEP was not implemented, and that he was not in an appropriate placement.

- Prospective placement at Accotink Academy for the remainder of the school year.
- ESY services for the summer of 2013.

The Student was denied FAPE because his IEP was not reasonably calculated to enable him to be involved in and progress in the general education curriculum because it lacked ESY services which would have been reasonably employed to help him be involved in and progress in the general education curriculum and make progress toward his IEP goals, and the IEP lacked a statement of the Student's present levels (as of May 14, 2012) of academic achievement and functional performance, which render the remainder of the IEP invalid. Furthermore, the IEP was not significantly changed, but for the elimination of ESY services, despite the Student's lack of progress over the 2011-2012 school year.

IV. EVIDENCE

Eight witnesses testified at the hearing, five for the Petitioner and three for the Respondent. The Petitioner's witnesses were:

1) The Petitioner, Student's Mother (P)
2) [redacted], Advocate/Mentor (M.H.)
3) [redacted], Advocate (J.F.)
4) [redacted], Accotink Academy (A.W.)
5) [redacted], Tutor (C.R.)

The Respondent's witnesses were:

1) [redacted], DCPS Assistant Principal (T.C.)
2) [redacted], DCPS Co-Location Classroom Coordinator (N.G.)
3) [redacted], DCPS Special Education Coordinator (A.T.)

Most of the witnesses testified credibly. The Petitioner provided general statements that, when pressed for details, were shown not to be accurate. For example, the Petitioner repeatedly testified that she received calls from school daily about the Student. However, when details about these calls were explored, she specifically identified two calls she received this school year. Thus, testimony of the Petitioner that lacks any detail is suspect and not relied upon.

21 exhibits were admitted into evidence of 26 disclosures from the Petitioner. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 4	September 27, 2012	Resolution Period Disposition Form
P 5	July 21, 2011	Resolution Meeting Notes
P 6	August 19, 2011	Multi Disciplinary Team Notes
P 7	May 14, 2012	IEP
P 8	May 14 2012	Meeting Notes
P 9	June 11, 2012	Manifestation Meeting for [Student, Notes]
P 11	[Undated]	Psychological Evaluation [conducted March 2012]
P 12	[Undated]	Functional Behavioral Assessment [conducted March 2012]
P 13	April 17, 2012	Competency Evaluation
P 14	April 27, 2012	Positive Behavior Intervention Plan
P 15	May 1, 2012	[Untitled – Behavior Intervention Plan]
P 16	[Undated]	Student Incident Report
	January 25, 2012	Notice of Final Disciplinary Action
	May 23, 2012	[Untitled – Manifestation Determination]
	May 31, 2012	Notice of Proposed Disciplinary Action
P 17	April 27, 2012	Attendance Summary
P 18	June 14, 2012	Report to Parents on Student Progress
P 19	September 21, 2012	Notice of Final Disciplinary Action
	September 28, 2012	Notice of Final Disciplinary Action
P 20	September 24, 2012	Attendance Summary
P 21	January 15, 2012	Email chain ending from P to Hull
P 23	October 9, 2012	Letter from [redacted] to P
P 24	[Undated]	Curricula Vitae for [redacted]
P 25	[Undated]	Resume for [redacted]
P 26	[Undated]	Compensatory Education Plan

Three exhibits were admitted into evidence of the Respondent's four disclosures. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	September 27, 2012	Meeting Participants
	August 2, 2012 [Typo]	RSM Notes
R 2	May 14, 2012	Meeting Notes
R 3	May 1, 2012	[Untitled – Behavior Intervention Plan]

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 [redacted] learner with a disability.[3] The Student is eligible for special education and related services because his disabilities result in needs that meet the definition of emotional disturbance under the IDEA.[4] The Student's disabilities are: Oppositional Defiant Disorder (ODD); Attention Deficit Hyperactivity Disorder (ADHD), inattentive type; and Learning Disorder, NOS.[5] (There is no evidence the Student has a specific learning disability under IDEA.)[6]
2. The Student currently attends the Rise program, a self-contained special education program for students with behavioral problems, located at Shaw Middle School.[7] During the 2011-2012 school year the Student was in the Spectrum program, also a self-contained special

[3] P 7.
[4] P 7.
[5] P 11, P 12.
[6] *See:* Testimony (T) of T.C. (Student's needs are not so much academic, but behavioral) and P 11/P12 (Student not meeting academic potential due to behaviors.)
[7] Undisputed Fact (UF), T of P, T of N.G.

education program at Shaw Middle School which was provided by a private contractor, and which is now administered directly by DCPS as the Rise program.[8] The Rise program consists of two classrooms of up to 10 students each (current enrollment is five to six each).[9] There are a minimum of three adults in each class.[10]

3. The Student's disabilities cause him to be easily distracted, impulsive, hyperactive, verbally aggressive, sleep in class and "shutting down", leaving class, and oppositional.[11] These manifestations affect his involvement and progress in the general education curriculum by resulting in not being engaged in the learning process.[12] Because of the Student's familiarity with the students and building at Shaw, he is able to leave the Rise program and avoid class.[13]
4. The Student made little to no progress academically or functionally during the 2011-2012 school year.[14] As of April 2011, his academic skills were at the fourth grade level in math and third grade level in reading and writing.[15] No progress was made beyond this during the 2011-2012 school year.[16] There has been some progress in functional skills during the current school year, with the Student leaving the classroom less.[17]
5. The Student's education has also been impacted by factors beyond his disability, such as attendance and not arriving at school prepared or clean.[18]

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[8] T of T.C., T of N.G.
[9] T of N.G.
[10] T of N.G.
[11] P 11, T of J.F., T of T.C., T of N.G.
[12] P 7, P 8/R 2, P 11, T of J.F., T of P, T of T.C., T of M.H., T of N.G.
[13] T of T.C., T of N.G.
[14] P 8/R 2, P 18, T of P, T of T.C., T of M.H., T of N.G., T of N.G. (P testified that the Student's final grades for the 2011-2012 school year were inflated after she began complaining about the Student's progress. This is supported by the fact that the Student has not mastered elementary school academic skills, yet earned all passing grades for the school year (although Fs were reported earlier in the school year).)
[15] P 8/R 2, P 11, P 12.
[16] P 7, P 8/R 2, P 18, T of M.H., T of J.F., T of T.C., T of N.G.
[17] T of N.G., P 20.
[18] P 17, P 20, P 7, P 8/R 2, P 11, P 12, P 13, T of T.C., T of N.G.

6. An IEP team meeting was held on May 14, 2012.[19] The Petitioner's advocate, M.H., requested the Student be provided with ESY services for the summer because they were provided during the prior two summers, and he continued to have behavior problems.[20] School staff advised the team that the Student did not qualify for ESY services because even though he made no progress during the school year, he would not regress academically or socially over the summer.[21] This was the only criteria used to make the determination.[22]
7. The IEP revision from the May 14, 2012, IEP team meeting included a statement of the Student's levels of academic achievement and functional performance that was from his sixth grade year when he was [redacted].[23] The statement also included Woodcock Johnson III data from April 2011.[24] Occupational therapy services were increased from 30 minutes per week to one hour per week, and no other changes to the level of services or educational placement were made.[25]
8. The Student was accepted at Accotink Academy a year ago and again in October 2012.[26] Accotink Academy is a fully segregated therapeutic special education day school in Springfield, Virginia, designed for students with emotional disturbance, learning disabilities, multiple disabilities, and other health impairments.[27] There are 112 students at the school and they come from Virginia and the District of Columbia, some of whom are placed there by DCPS and by OSSE.[28] The school serves students from age five to 21, and all classes have a

[19] UF, P 8/R 2.
[20] P 8/R 2, T of M.H.
[21] P 8/R 2, T of T.C., T of M.H.
[22] P 8/R 2, T of T.C., T of M.H.
[23] P 7.
[24] P 7.
[25] P 6, P 7, P 8/R 2.
[26] P 23, T of A.W.
[27] T of A.W.
[28] T of A.W.

student to adult ratio of at least 3 to 1.[29] Related services, such as counseling, social work services, occupational therapy, and others, are provided for students at the school who require them. The school's cost, $293.09 per day, is approved by OSSE, as is the cost of individual counseling, which is billed at $157.26 per hour.[30] The school uses the curriculum of the jurisdictions the students come from, and utilizes IEPs developed with the public school districts.[31] A school-wide behavior intervention plan is utilized and is adopted to each student's individual needs.[32] The Student was accepted by the school, but has not yet enrolled because the Petitioner could not afford the cost, following a review of his records and a day-long shadowing experience by the Student at the school.[33] The school does not keep students it determines it cannot properly serve or handle.[34] The Student's need for a supporting learning environment and academic remediation can be met at Accotink.[35]

9. The Respondent has recently (following the complaint) advised the Petitioner that the Student could be sent to a self-contained program at Ron Brown Middle School (Ron Brown).[36] Ron Brown has a self-contained program for students with emotional disorders.[37] There are two classes for each grade served - sixth, seventh, and eighth grades - for a total of six classes.[38] There are currently 43 students in the program and around eight to nine students in each class.[39] There are at least two adults in every class, with more service providers, such

[29] T of A.W.
[30] T of A.W.
[31] P 23, T of A.W.
[32] T of A.W.
[33] T of A.W.
[34] T of J.F.
[35] T of A.W.
[36] T of A.T., T of N.G.
[37] T of A.T.
[38] T of A.T.
[39] T of A.T.

as behavioral technicians and security guards, available.[40] There is a program-wide positive behavior intervention plan in place that rewards students for functional and academic progress.[41] Staff from a private company contracted by the Respondent, "Positive Nature," meet with students daily to assist them in reaching the goals on their IEPs.[42] The average cost for educating a student in the program is approximately $8,500 per year.[43]

10. The Petitioner proposed a compensatory education plan that is far different than her requested remedy, including one on one tutoring in reading, writing, and mathematics for six hours per week for 36 weeks (216 hours), and behavioral support services consisting of one on one counseling for four hours per week for 36 weeks (144 hours).[44] The plan also proposes the provision of a laptop computer and $500 for unspecified educational software to "be used by [Student] throughout his academic life."[45] This plan is based on assertions both raised in the complaint (that ESY services were not provided over the summer of 2012, and he was not properly placed in a therapeutic environment to meet his emotional needs) and an assertion not raised in the complaint – an alleged failure to implement his IEP.[46] The plan is not based on where the Student's would have been educationally but for the alleged violations named in the complaint and is not based on any current academic or functional data showing this and is speculative and arbitrary.[47]

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[40] T of A.T.
[41] T of A.T.
[42] T of A.T.
[43] T of A.T.
[44] T of C.R., P 26.
[45] P 26.
[46] P 26.
[47] T of C.R., P 26.

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).

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. 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.

3. "Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child." 34 C.F.R. § 300.106(a)(2), D.C. Mun. Regs. 5-E3017.2. According to OSEP, "States may use recoupment and retention as their sole criteria but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations." 71 Fed. Reg. 46582 (2006). The Respondent has argued that recoupment and retention is the sole criteria in the District of Columbia for making ESY determinations, but as D.C. Mun. Regs. E-E3017.2 demonstrates, the law for ESY in the District of Columbia is currently identical to federal law and provides no particular criteria for making ESY determinations. Thus, it was not permissible for the Respondent to limit the ESY determination to merely looking at regression and recoupment. The Petitioner's advocate proposed at the IEP team meeting that ESY was necessary because of the Student's lack of

behavioral improvement and because the Student had been provided ESY for the last two summers. Since the Student continues to require significant special education and related services in order to be involved in and progress in the general education curriculum (where he was at the third to fourth grade level in seventh grade) and to make progress toward his academic and functional goals, which he had made no progress on, the Petitioner has shown that ESY services were necessary to provide a FAPE to the Student because that service was likely to at least ameliorate his educational difficulties. The Respondent impermissibly limited the team discussion about ESY to regression and recoupment as the sole criteria. Thus, the Student was denied a FAPE because ESY was not included in the IEP for the summer of 2012 despite the Student's lack of progress behaviorally and academically and significant need for remediation in academic skills.

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.

The IEP team makes the placement determination for the Student. D.C. Mun. Regs. E-E3001.1.

5. The Student's IEP was last revised May 14, 2012, and the only dispute at the team meeting was about ESY services. The IEP team agreed the Student would remain in a setting outside of the general education setting, and that setting had been determined to be the self-contained special education program at Shaw Middle School, at that time called "Spectrum." The IEP itself shows, however, that it was fundamentally flawed because it lacked a statement of the Student's present levels of academic achievement and functional performance. The statement in the IEP was at least a year old with no current data about performance included. Therefore, the remainder of the IEP cannot be trusted to be reasonably calculated to provide educational benefit. Furthermore, the evidence shows the Student had not progressed academically or functionally. Thus, this glaring deficiency in the IEP cannot be ignored.

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). Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3rd 516, 523, (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in

awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., *citing* Reid, 401 F.3d at 524; *see* Stanton ex rel. K.T. v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010).

7. The Petitioner requested 60 hours of compensatory education and eight hours of compensatory counseling to make up for the missed ESY services. At hearing the Petitioner presented a compensatory education plan that was not based at all on the missed ESY services. The Petitioner did not show where the Student would have been but for the failure to provide ESY services over the summer of 2012. Given the Student's overall lack of educational progress, it is questionable that ESY services alone, with his current program, would have made much difference. It is the Undersigned's determination that the relief provided for the Student's overall lack of FAPE will be a remedy for the failure to provide ESY over the summer of 2012, and that ESY will be provided over the summer of 2013 in order to aid the Student's acquisition of appropriate behavioral skills and academic remediation, if still necessary near the end of the current school year.

8. 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, (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, (D.C. Cir. 2005).

9. In this case, the nature and severity of the Student's emotional disorders have resulted in a failure to be engaged in the curriculum and demonstrate knowledge of elementary school education standards which are necessary for him to be involved in and progress in the secondary school curriculum. The evidence shows that there is concern that the Student also may not be progressing at the self-contained program at Shaw because he is familiar with the building and students in the regular school and, due to his disability, utilizes that familiarity to cope with his frustration with school work by leaving the classroom, as well as shutting down (e.g. sleeping). The Petitioner's proposed school, Accotink, has a low student to teacher ratio and is particular about keeping students engaged in class. Behavior is constantly addressed through various means, including a building-wide behavior plan that is individually tailored to individual students' needs. Perhaps most importantly, the school can also remediate his academic skills to bring him closer to the grade level standards of his peers and put him on track to being involved in and progressing in the general education curriculum. The cost of the school has been approved by OSSE, and so, while more expensive than a public school, is not outrageous for the kind of specialized segregated program it is. Finally, because it is a segregated school for children with disabilities, Accotink is a more restrictive setting than the Student has been in previously. However, given the remediation he requires, as well as his behavioral needs, it is the least restrictive setting to the maximum extent appropriate to meet his needs. While the evidence shows there

are factors beyond his disability that are impacting his educational progress, such as attendance in general and being prepared for school (such as arriving with clean clothes and rested), these factors are intertwined with his special education needs. Thus, in order for the Student to be provided a FAPE, he must be provided with intensive remediation that will eventually result in him demonstrating basic proficiency in elementary academic skills.

VII. DECISION

The Respondent denied the Student a FAPE when it limited the determination about whether the Student required ESY services for the summer of 2012 based on whether his regression of skills would require an inordinate amount of recoupment time, and did not include ESY services in the IEP to ensure FAPE when the Student had made little to no progress on his IEP goals over the course of the 2011-2012 school year and continued to be working on elementary school education skills even though promoted to the 7th grade for the 2011-2012 school year (and to the 8th grade the following year), and the IEP lacked a statement of the Student's present levels of academic achievement and functional performance which rendered the remainder of the IEP invalid.

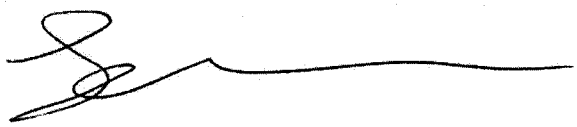
VIII. ORDER

1. The Student will be placed at Accotink Academy for the remainder of the 2012-2013 school year, at public expense, including transportation and related services. This placement must take effect no later than December 3, 2012.
2. Near the end of the 2012-2013 school year, the Respondent will conduct a comprehensive reevaluation of the Student to determine his then current levels of academic achievement and functional performance. The Student's IEP team will review the assessment reports and

review and revise the DCPS IEP either the final week of the 2012-2013 school year at Accotink or the first week following the final week. The IEP will include all of the contents required pursuant to 34 C.F.R. § 300.320(a). Following the revision of the IEP, the IEP team will make a specific placement determination, including the identification of the school the Student will attend for the 2013-2014 school year.

3. The Student will be provided ESY during the summer of 2013, if he is not yet demonstrating basic proficiency on eighth grade academic standards by the end of the 2012-2013 school year.

IT IS SO ORDERED.



Date: November 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).