

**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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[Parent], on behalf of  
[Student],<sup>1</sup>

Date Issued: October 25, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on August 13, 2013. The Petitioner and Respondent are both represented by counsel. On August 15, 2013, the Petitioner filed a motion for stay-put. The Respondent had agreed to maintain the Student's current educational placement, so the motion became moot and no order was required. A response to the complaint was filed by the Respondent on August 16, 2013. A prehearing conference was convened on August 26, 2013, and a prehearing order was issued on that date. A revised prehearing order was issued September 12, 2013, based on edits proposed by the Petitioner to the issue questions. A resolution meeting was held on August 28, 2013, and resulted in no agreements.

Motions had been filed and orders issued in the process concerning one of the Petitioner's witnesses who required accommodation due to illness. The witness became unavailable to testify

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even with accommodations, so those motions and orders are irrelevant. The Petitioner was granted permission for another witness, K.M., to testify via telephone because she was located in California.

On October 2, 2013, the Petitioner filed his trial brief and shared his disclosures. On October 3, 2013, the Respondent filed its trial brief and shared its disclosures. The hearing was convened at 9:00 a.m. on Wednesday, October 9, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing recessed at 3:15 p.m. The hearing reconvened at 9:30 a.m. on Wednesday, October 23, 2013, and concluded at 11:30 a.m. The due date for this Hearing Officer's Determination (HOD) is October 27, 2013. This HOD is issued on October 25, 2013.

## **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. 5-E30.

## **III. ISSUES, RELIEF SOUGHT, and DETERMINATION**

The issues to be determined by the IHO are:

- 1) Whether the Respondent unilaterally changed the Student's educational placement from the non-public special education school to a regular public school?
- 2) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose or provide an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of his other educational needs that result from his disability, when the IEP proposed in June 2013 lacked: a) an accurate statement of the Student's present levels of academic achievement and functional performance; b) sufficient specialized instruction outside of the general education

setting in a small group setting in a special education day school; c) extended school year (ESY) services; d) therapeutic lunch; e) psychiatric services; f) daily and on-call counseling services and crisis management, and g) adjunct therapies such as art and woodworking?

- 3) Whether the Respondent denied the Student a FAPE when it failed to provide prior written notice of its proposal to change the Student's educational placement from a non-public special education day school to a regular public school?

The Petitioner is seeking to have the Student remain in his placement in the Attending School. The Petitioner is also seeking to have the Student's IEP revised.

The Respondent unilaterally changed the Student's educational placement from the non-public special education school to a regular public school. 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 make progress in the general education curriculum, and meet each of his other educational needs that result from his disability, when the IEP proposed in June 2013 lacked sufficient specialized instruction outside of the general education setting in a small group setting in a special education day school. The Respondent denied the Student a FAPE when it failed to provide proper prior written notice of its proposal to change the Student's educational placement from a separate special education day school to a special education classroom in a regular public school.

#### **IV. EVIDENCE**

Seven witnesses testified at the hearing, five for the Petitioner and two for the Respondent. The Petitioner's witnesses were: the Petitioner himself (P), the IEP coordinator from the Attending School (K.M.), the Case Worker and Chief Social Worker from the Attending School (S.N.), the Executive Director on the Attending School (A.K.), and an expert in special education programming and placement providing an opinion on what kind of program the Student requires

(S.I.). The Respondent's witnesses were the Special Education Coordinator for the Public School (T.S.) and the Program Monitor for the Attending School (A.S.).

All 19 of the Petitioner's disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. All nine of the Respondent's disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

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 credibility issues are specifically noted in the findings of fact. Most of the evidence offered by the parties was uncontroverted, although some descriptions of events at the various IEP team meetings over the course of the 2012-2013 school year were in dispute, but not necessarily material. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. 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 12 year old learner with a disability who currently attends the Attending School where he was placed six years ago following a due process complaint.<sup>2</sup> The Student was determined by the Respondent to be eligible for special education and related services under the category of Emotional Disturbance.<sup>3</sup> The Student has been diagnosed with several

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<sup>2</sup> Testimony (T) of P, P 3.

<sup>3</sup> P 8.

conditions: Attention Deficit Hyperactivity Disorder; Oppositional Defiant Disorder; Depression; Adjustment Disorder; Mixed Language Disorder; Mixed Conduct and Emotional Disorder; Post-traumatic Stress Disorder; and General Anxiety Disorder.<sup>4</sup> These conditions wax and wane along with the resulting behaviors.<sup>5</sup> The Student has good motor skills, but his executive functioning is negatively impacted by external distractions.<sup>6</sup> He is impulsive, has difficulty with organization and task completion, but responds well to redirection.<sup>7</sup> His most significant issue is anxiety and he does not self-calm easily.<sup>8</sup> He takes medications for his mood disorder and to help with his focus and distractibility.<sup>9</sup>

2. The Attending School is a non-public special education day school that provides a therapeutic support program for emotionally troubled students.<sup>10</sup> The mission of the School is to help these students transition back to a public school.<sup>11</sup> Students at the Attending School are taught to plan (anticipatory guidance), as a way to help them cope with their disabling deficits.<sup>12</sup> There are 31 students currently at the Attending School and the average class consists of four students.<sup>13</sup> Students enter the school between the ages of five and ten, and may stay through age 12 or 13.<sup>14</sup> The cost of the program, approved by the Office of the State Superintendent of Education (OSSE) is \$267 per diem for 210 days per year (\$56,070.00 annually). There are three psychiatrists at the school, each half-time, to review and evaluate all intake and children on medications, and to supervise social work services,

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<sup>4</sup> T of S.I., T of S.N., P 3.

<sup>5</sup> T of S.I., T of P.

<sup>6</sup> T of S.I.

<sup>7</sup> T of S.I., T of P.

<sup>8</sup> T of S.I.

<sup>9</sup> T of S.N.

<sup>10</sup> T of S.I., T of A.K., T of S.N.

<sup>11</sup> T of A.K.

<sup>12</sup> T of S.I.

<sup>13</sup> T of A.K.

<sup>14</sup> T of A.K.

among other things.<sup>15</sup> There is also a psychologist on staff to review intake and conduct educational testing.<sup>16</sup> There are seven social workers, five full-time, who are responsible for case management and therapy.<sup>17</sup> The school has four full-time special education teachers, three half-time reading specialists (because reading problems are common with the School's students), a full-time speech and language pathologist, an occupational therapist, and a full-time nurse.<sup>18</sup> The School also has a full-time workshop teacher who has been with the School for 35 years and whose shop classes are designed to be a part of the therapeutic milieu of the School.<sup>19</sup> There are 10 counselors, full-time or staff, who work on treatment plans and work with students during free-time, lunch, and during crisis.<sup>20</sup> Lunch is served family-style and is also part of the therapeutic milieu of the School.<sup>21</sup> Students eat with staff who facilitate social interaction and conversation, calming the students for the afternoon.<sup>22</sup>

3. There were four IEP team meetings for the Student over the course of the 2012-2013 school year (sixth grade): October 9, 2012; February 14, 2013; May 13, 2013; and June 11, 2013.<sup>23</sup> The October meeting was an annual IEP review and the IEP was revised for the year.<sup>24</sup> The Petitioner, A.S., K.M., S.N., and the Student's special education teacher all participated in the meeting.<sup>25</sup>
4. The Student's present level of academic achievement in October 2012 was working at the mid-third grade level in writing skills, the 3.1 grade level in reading skills, and fourth grade

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<sup>15</sup> T of A.K.

<sup>16</sup> T of A.K.

<sup>17</sup> T of A.K., T of S.N.

<sup>18</sup> T of A.K.

<sup>19</sup> T of A.K.

<sup>20</sup> T of A.K.

<sup>21</sup> T of A.K.

<sup>22</sup> T of A.K.

<sup>23</sup> T of P, T of A.S., P 8, P 11, P 14, P 17, R 4, R 8.

<sup>24</sup> T of K.M., T of P, T of A.S. P 8, R 8

<sup>25</sup> P 8.

level in math skills.<sup>26</sup> The annual academic goals in the IEP were revised and included three writing goals, four reading goals, and three math goals, all to be achieved by October 2013.<sup>27</sup> The Student was struggling with inattention, focus, and impulsivity.<sup>28</sup> He was demonstrating low frustration tolerance with peers, particularly when peers have a different point of view.<sup>29</sup> He was also seen by peers as a leader.<sup>30</sup> His annual functional goals were revised to include eight goals to be achieved by October 2013.<sup>31</sup> It was noted that the Attending School is an 11 month program, and so ESY would not be necessary.<sup>32</sup> It was determined that the Student would remain at the Attending School for the 2012-2013 school year.<sup>33</sup> His level of specialized instruction was for 29 hours per week, outside of the general education setting, and one hour per week of behavioral support services.<sup>34</sup>

5. A.S. convened another meeting for February 14, 2013, and it was referred to as a “LRE” meeting because the purpose of the meeting was to “[d]iscuss [Student’s] progress [at Attending School] and determine if [Attending School] is still an appropriate LRE.”<sup>35</sup> In addition to A.S., the Petitioner, K.M, S.N., the Special Education Teacher, and an intern attended the meeting.<sup>36</sup> He was still reading at the third grade level, but had progressed to the fifth grade level in mathematics.<sup>37</sup> His behavior difficulties were continuing to be a problem,

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<sup>26</sup> R 8, P 7, P 8.

<sup>27</sup> P 8.

<sup>28</sup> R 8.

<sup>29</sup> R 8.

<sup>30</sup> R 8, T of S.N.

<sup>31</sup> P 8.

<sup>32</sup> P 8, R 8.

<sup>33</sup> P 8, R 8., T of P, T of A.S. (There was some dispute of fact as to whether the agreement covered the following school year. Whether it did, or not, is immaterial to the issues in this case since the IEP was reviewed and revised again in June 2013.)

<sup>34</sup> P 8.

<sup>35</sup> T of A.S., T of K.M., P 11, R 4.

<sup>36</sup> P 11, R 4.

<sup>37</sup> P 11, R 4.

and for those reasons the entire team agreed he should remain at the Attending School.<sup>38</sup>

A.S., however, told the team that while “everyone is agreement [sic] that the [Attending School] still continues to be an appropriate placement[,] I will speak [with] my program manager for the final decision. I definitely am thinking [Attending School] is still an appropriate placement because he still demonstrates needs that require therapeutic attention and that he shouldn’t move to a larger setting. I should have an answer [within] a week.”<sup>39</sup>

6. Academically the Student made progress through the winter.<sup>40</sup> He was on the fifth grade level in math and still progressing, was now working on fourth grade skills in reading, and writing was also progressing, with spelling skills now on the fourth grade level as well.<sup>41</sup> Functionally, the Student saw inconsistent progress.<sup>42</sup> His need for one to one counselor support decreased, however.<sup>43</sup> He was letting the negative influence of others determine his choice making, and was sometimes initiating problems.<sup>44</sup>
7. The team was convened again on May 13, 2013, where the Respondent, through A.S., advised the team that the Student would be placed at a specific public middle school.<sup>45</sup> The decision was made by the Respondent, not the IEP team, and the rest of the team did not agree.<sup>46</sup> According to A.S., the Respondent makes placement determinations in consideration of data collected throughout the year.<sup>47</sup> According to A.S., it is the Respondent’s responsibility to determine placement and what the Student needs, and his role is to help

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<sup>38</sup> P 11, R 4. (No changes in the IEP were made.)

<sup>39</sup> P 11, R 4, T of K.M, T of P. (This finding is based, primarily, on notes taken at the meeting, which are consistent with the testimony cited, and not on A.S.’s recollection of the meeting described during his testimony.)

<sup>40</sup> P 13/R 2.

<sup>41</sup> P 13/R 2.

<sup>42</sup> P 12/R 3.

<sup>43</sup> P 12/R 3.

<sup>44</sup> P 12/ R 3.

<sup>45</sup> P 14, T of A.S.

<sup>46</sup> P 14, T of A.S.

<sup>47</sup> T of A.S.

direct the IEP team.<sup>48</sup> A.S., with other Respondent staff who are not part of the Student's IEP team, make the placement determination.<sup>49</sup> The specific middle school identified in May was selected as a location of service for the Student because of the address the Respondent had on file, which was an incorrect address for the Student.<sup>50</sup> A.S., P, S.N., K.M., and the Special Education Teacher attended the meeting.<sup>51</sup>

8. The next and final IEP team meeting was convened on June 11, 2013, by A.S.<sup>52</sup> A.S., Petitioner, K.M., S.N, the Special Education Teacher, and the Program Manager from the Respondent (A.S.'s supervisor) attended the meeting.<sup>53</sup> The applicable common core standards were added to the IEP, and the goals were extended from having to be reached by October 2013 to being reached by June 2014.<sup>54</sup> The statement of the Student's present levels of academic achievement and functional performance were also updated based on the progress seen over the course of the year.<sup>55</sup> The level of specialized instruction was reduced from 29 hours per week to 26.5 hours per week, outside of the general education setting.<sup>56</sup> This change was based on the Respondent's "recommendation" that the Student's placement be changed to a less restrictive environment.<sup>57</sup> While a new location of service was not identified until June 27, 2013, (the Public School) the Respondent's position on the change of placement had not changed.<sup>58</sup>

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<sup>48</sup> T of A.S.

<sup>49</sup> T of A.S.

<sup>50</sup> T of A.S., T of P.

<sup>51</sup> P 14, T of K.M.

<sup>52</sup> T of A.S., T of P, P 17.

<sup>53</sup> P 17, T of A.S., T of P, T of K.M.

<sup>54</sup> P 17.

<sup>55</sup> P 17.

<sup>56</sup> P 8, P 17.

<sup>57</sup> P 17, T of A.S.

<sup>58</sup> P 17, T of A.S., T of P.

9. A prior written notice of the change of placement was dated June 11, 2013, and included a description of the Respondent’s proposal: “a change to a lessor restrictive environment (100% separate classroom) for the 2013-2014 school year.”<sup>59</sup> The notice stated that the proposed action was based on “Teacher/related service provider evaluation and observations. LEA observations.”<sup>60</sup> The notice stated that other options considered and the reasons for rejecting were: “[Student] will continue to receive transportation and accommodations.”<sup>61</sup> Finally, in relevant part, the notice said that other factors related to the proposal were not applicable.<sup>62</sup> The notice did not include any information about the Respondent’s refusal to keep the Student’s placement the same, at the Attending School, and no other notice was provided.<sup>63</sup>
10. The Public School is a mainstream middle school with approximately 280 students and has a new self-contained classroom for students with behavioral and emotional disabilities.<sup>64</sup> The classroom has the capacity for ten students, and is taught by a special education teacher with the assistance of a behavior technician and a paraprofessional.<sup>65</sup> Multiple related service providers assigned to the Public School are available for the students in the self-contained classroom.<sup>66</sup> Student’s spend time in the self-contained classroom as directed by their IEPs, and so may not be in there for all instruction.<sup>67</sup> All students in the self-contained classroom

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<sup>59</sup> P 17.

<sup>60</sup> P 17.

<sup>61</sup> P 17. (Of course, the statement is not, in fact, an option considered and the reason it was rejected, but this is what the notice said.)

<sup>62</sup> P 17.

<sup>63</sup> P 17.

<sup>64</sup> T of T.S.

<sup>65</sup> T of T.S.

<sup>66</sup> T of T.S.

<sup>67</sup> T of T.S.

interact with non—disabled peers during breakfast, if they opt to participate in that service, and at lunch.<sup>68</sup>

## **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 a 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. Educational placement is a concept within the Individuals with Disabilities Education Improvement Act (IDEA) that works hand-in-hand with the concept of least restrictive environment (LRE). *See*: 34 C.F.R. §§ 300.114-300.120, also 71 Fed. Reg. 46587, 45588 (August 14, 2006). There is a continuum of alternative placements each LEA must have, including “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions[.]” 34 C.F.R. § 300.115. Furthermore, while the placement decision is based on the IEP of the child, the IEP of the child is not based on the placement. 34 C.F.R. § 300.324. The Office of Special Education Programs (OSEP) analyzed the question of “whether a public school board has the unilateral discretion under the [IDEA]

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<sup>68</sup> T of T.S.

to choose the educational placement of a child with a disability as an administrative matter to the exclusion of any input from that child's parents.” Letter to Veazey, 37 IDELR 10 (OSEP Nov. 26, 2001). The answer is no, but the matter is more complicated because of the vagaries of what is a “placement.” The selection of a particular location for services (the physical surrounding, such as the classroom) is not a change in placement. 71 Fed. Reg. 46588-89 (August 14, 2006). According to OSEP:

Historically, we have referred to “placement” as points along the continuum of placement options available for a child with a disability, and “location” as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child’s special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

Id. at 46588. Parents are to be “members of any group that makes decisions on the educational placement of their child.” 34 C.F.R. § 300.327, *See also* 34 C.F.R. § 300.116 & D.C. Mun. Regs. 5-E3013.1. In the District of Columbia this group is the IEP team. *See* D.C. Mun. Regs. 5-E3001.1.

3. The Respondent has made conflicting arguments about the placement determination in this case. On the one hand, the Respondent argues, in spite of the abundance of evidence including the testimony of its own witness, A.S., and the prior written notice at P 17, that there was not change in placement, but only a change in location of service. On the other hand, the Respondent argues, not alternatively but consecutively, that it has an obligation to ensure the Student is in the LRE and that it made the determination of what that LRE is for the Student. The former argument is not convincing because the evidence clearly demonstrates the Student’s placement was changed to a less restrictive setting, substantially different from the Attending School program. This decision was not made by the IEP team, but rather by the Respondent, through its agent, A.S. While A.S. had an important role to

play on the IEP team, it was not for him to determine the Student's placement, but the IEP team as a whole. Given the near consensus of the IEP team that the Student's placement should not be changed, the Respondent could have requested a due process hearing to convince a hearing officer its position (not decision) was correct for the Student. It did not. It merely made the decision on its own, lacking the authority to do so. Thus, even assuming the change of placement for the Student was appropriate, it was not a change determined by the IEP team based on the IEP. In fact, the IEP was changed to fit the placement determined by the Respondent.

4. 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). A procedural violation will only be found to have resulted in a denial of FAPE if:

the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2). 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). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide these education benefits. Suggs v. District of Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “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 [516,] 519-20 [(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; 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, 679 F. Supp. 2d at 51-52. This line of reasoning is supported by the statute and regulations themselves. The IEP is a living document that, once initially created and consented to, is reviewed “periodically, but not less than annually, to determine whether the annual goals for the child are being achieved[.]” 34 C.F.R. § 300.324(b).<sup>69</sup> The IEP must then be revised to address:

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child’s anticipated needs; or
- (E) Other matters.

34 C.F.R. § 300.324(b)(2)(ii). The IEP team must, for a “child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]” 34 C.F.R. § 300.324(a)(2)(i).

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<sup>69</sup> The law does not provide for periodic review to determine whether the “LRE” is appropriate. This would not make sense because the goals are the drivers of the services and, ultimately, the educational placement. As noted above, placement is based on the IEP, so the placement would be determined following the rest of the elements of the IEP.

5. The analysis to apply in a case such as this is to first determine whether the agency “complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982) (footnotes omitted).
6. The Petitioner has not shown the June 2013 revision lacks an accurate statement of the Student’s present levels of academic achievement and functional performance. The academic and functional progress made during the year, reflected in the most recent reports from the school, are reflected in the IEP. The Petitioner has shown that the IEP lacks sufficient specialized instruction outside of the general education setting, in a small group setting in a special education day school. The steady progress the Student has made should be continued with the services that had been provided. The evidence shows the Respondent required the reduction in service hours because it had determined (as concluded supra) to change the Student’s placement for the 2013-2014 school year, not because the Student no longer required that level of service. Additionally, the Student’s level of service was over the course of 11 months, longer than the usual school year, and the IEP proposed in June, by not including placement at another 11 month school or by including ESY services, reduced those services as well, without adequate justification. Other services have been provided to the Student but were not included in the IEP by virtue of the school he has been attending. Regardless of whether the Student remains at the Attending School, those services must be listed properly in the IEP unless the IEP team determines they are no longer necessary to

ensure a FAPE. This failure alone is a procedural violation given the Student was always receiving those services, but the proposed change in placement potentially effecting the elimination of the services would have been a denial of FAPE had the change been implemented. Thus, the proposed IEP was not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of his other educational needs resulting from his disability, denying him a FAPE. The Petitioner also has shown behavioral support services, including therapeutic lunch, daily and on-call counseling services, and crisis management are all necessary related services to continue to enable the Student to receive a FAPE. The Petitioner has not shown adjunct therapies, such as Art and Woodworking are necessary to provide FAPE. While these “therapies” may be nice, they are not essential. Further, psychiatric services are not a related service the public agency is required to provide because the services of a medical doctor, beyond evaluation or diagnostic purposes, go above and beyond what is required for related services. *See* 34 C.F.R. § 300.34, Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 892, (1984) (“Although Congress devoted little discussion to the “medical services” exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence.”).

7. The Respondent failed to ensure the procedures under IDEA were followed when it did not provide proper prior written notice following the June 2013 IEP team. The notice must include:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the agency's proposal or refusal.

34 C.F.R. § 300.503(b), *see also*, D.C. Mun. Regs. 5-E3025.1. The notice clearly stated the Respondent was “proposing a change to a lesser restrictive environment (100% separate classroom) for the 2013-2014 school year.” The explanation for the change was not clear nor was the description of the “data” used as a basis for the decision (unspecified “evaluations” and “observations”). The notice also lacked a description of the other options considered (even though the team discussed keeping the Student at the Attending School, the Respondent had not apparently considered that), as well as other factors related to the proposal and refusal. The Supreme Court and the Court of Appeals for the Federal District Court for the District of Columbia emphasize the importance of procedural safeguards. Rowley, at 205 (1982), McKenzie v Smith, 771 F.2d 1527, 1532 (D.C. Cir. 1985). The Petitioner was not provided all of the required information in the notice. The failure to adhere to this procedural safeguard by the Respondent violates the first prong of the Rowley analysis, and so it must be determined the Student was denied a FAPE on this basis as well.

8. The IDEA authorizes the Hearing Officer to fashion “appropriate” relief to ensure FAPE, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations.” Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993); Reid v. District of Columbia, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Based on the evidence presented at the due process hearing, the findings and conclusions above, and relevant equitable considerations, the Hearing Officer concludes that the relief set forth in the Order below is appropriate to address the violations and denials of FAPE found herein.

## **VII. DECISION**

1. The Respondent illegally unilaterally changed the Student's educational placement from the Attending School to a less restrictive environment at the Public School because the decision was not made by the IEP team and was not based on the IEP.
2. 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 make progress in the general education curriculum, and meet each of his other educational needs that result from his disability, when the IEP proposed in June 2013 lacked sufficient specialized instruction outside of the general education setting in a small group setting in a special education day school over the course of at least an 11 month year. Other alleged problems with the IEP were not material, merely procedural, or were not violations at all, as concluded, supra.
3. The Respondent denied the Student a FAPE when it failed to provide proper prior written notice of its proposal to change the Student's educational placement from a separate special education day school to a special education classroom in a regular public school.

## **VIII. ORDER**

1. The Student will remain at the Attending School for the current school year at public expense, unless the parties agree otherwise.
2. The IEP will be revised within 30 calendar days to include:
  - a. 29 hours per week of specialized instruction provided outside of the general education setting in a small group, therapeutic environment, that provides services over at least eleven months per year (or alternatively, ESY services causing the school year to total eleven months);

- b. Therapeutic lunch daily, and
- c. Daily and on-call counseling services and crisis management, in addition to 60 minutes of scheduled counseling services per week.

**IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read 'Jim Mortenson', written over a light blue rectangular background.

Date: October 25, 2013

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Jim Mortenson, Esq.  
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).