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: January 17, 2013

Hearing Officer: Jim Mortenson

Case No: 2012-0770B

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on November 13, 2012. The Petitioner is represented by Alana Hecht, Esq., and the Respondent is represented by Maya Washington, Esq. The complaint was bifurcated into separate hearings based on one issue arising under 34 C.F.R. § 300.532 which was heard in an expedited hearing on December 7, 2012. The expedited Hearing Officer Determination (HOD) was issued on December 14, 2012. The remaining issues, the subject of this HOD, were heard on January 8, 2013. The evidence and findings of the expedited hearing are incorporated herein, as well as additional evidence heard on January 8, 2013.

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

The prehearing was convened in this case on November 21, 2012 and a prehearing order was issued on that date. A response to the complaint was filed on November 23, 2012. A resolution meeting was convened on November 26, 2012, and resulted in no agreements.

The parties were required to provide trial briefs in advance of the hearing outlining each party's legal arguments and describing the evidence they intended to present and how that evidence would support their cases including what documents would show or prove and what witnesses would testify about. As in the expedited matter, only the Petitioner's Counsel followed this order. The Respondent's brief did not address all of the issues for hearing and the evidence to be used to support its defenses. Additionally, the Respondent did not make an opening statement at hearing.

The Respondent moved for dismissal of the matter on November 28, 2012. The Petitioner filed a response to the motion on December 2, 2012. The Respondent argued that the matter was moot because the Student was no longer one of its students, having been placed in the custody of DYRS, and that because the Student was only removed for five days prior to being put under the custody of DYRS (and so was no longer under a 45 day suspension imposed by the Respondent) there was no claim for which relief could be granted. The arguments were unpersuasive as to both the manifestation determination appeal and the remaining issues because even a student who is no longer an LEA student is entitled to a hearing on a claim against a former school district as long as the claim is not more than two years old. In this case the remaining claims all arose within the last two years. The motion was denied as to the manifestation determination appeal, and was discussed further at the start of the hearing for this HOD and was similarly denied.

The Respondent's Attorney advised the Undersigned and the Petitioner's Counsel, at the hearing, that she was one of the Student's teachers during the 2011-2012 school year, prior to becoming an attorney for the Respondent.

The hearing for this matter (the non-expedited hearing) was convened at 9:00 a.m. on Tuesday, January 8, 2013, in room 2003 at 810 First Street NE, Washington, D.C. The HOD is due January 27, 2013. This HOD is issued January 17, 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 denied the Student a free appropriate public education (FAPE) when it failed to provide the Student with special education and related services in conformity with his IEP during the 2011-2012 school year (when it did not provide 26.6 hours of specialized instruction in an inclusive setting), and the 2012-2013 school year (when it did not place the Student in a segregated special education day school)?

(2) Whether the Respondent failed to provide an appropriate placement for the Student during the 2011-2012 school year (when the Student was not placed based on his IEP), and the 2012-2013 school year (when the IEP team made a determination to place the Student in a segregated special education day school and this placement was not executed)?

(3) Whether the Respondent denied the Student a FAPE when it failed to provide the Student with an IEP reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP, since November 2011, lacked sufficient specialized instruction; and the IEP revision in

October 2012 was not developed by a properly constituted IEP team, and lacked an updated behavior intervention plan (BIP)?

(4) Whether the Respondent failed to sufficiently reevaluate the Student in the 2012-2013 school year because it did not conduct a functional behavioral assessment (FBA)?

The Petitioner is seeking placement in a non-public special education day school and compensatory education consisting of remediation in an appropriate educational placement, and 50 to 75 hours of mentoring to provide the Student with a role model to build life and social skills and introduce the Student to appropriate leisure activities.

The Respondent denied the Student a FAPE when it failed to provide special education to the Student in conformity with his IEP when it did not provide 31.5 hours per week of special education outside of the general education setting during the first part of the 2011-2012 school year, and did not provide 26.6 hours per week of special education in the general education setting during the first part of the 2012-2013 school year.

The Respondent denied the Student a FAPE when it failed to place the Student for the 2011-2012 school year based on his IEP. The Petitioner has not shown that following the revision of the IEP in November 2011 that his placement was not based on the IEP. However, the Respondent failed to place the Student based on his IEP for the 2012-2013 school year.

The Respondent denied the Student a FAPE when it failed to provide the Student with an IEP reasonably calculated to enable him to be involved in and progress in the general education curriculum because the IEP, following the evaluation in January 2012, lacked sufficient specialized instruction outside of the general education setting. Petitioner has not shown that the IEP revision in October 2012 was not developed by a properly constituted IEP team or lacked an appropriate BIP.

The Petitioner has not shown the Respondent failed to sufficiently reevaluate the Student in the 2012-2013 school year because it did not conduct an FBA.

IV. EVIDENCE[2]

Six witnesses testified at the two hearings, three for the Petitioner and three for the Respondent. The Petitioner's witnesses were:

1) [redacted], Educational Advocate and special education expert (providing an expert opinion in the expedited hearing on how the Student's disability impacted his behavior for which he was disciplined, and an expert opinion at the present hearing about the compensatory education for the Student), (I.H.)
2) [redacted], Educational Advocate, (C.K.)
3) Petitioner, Student's Mother, (P)

The Respondent's witnesses were:[3]

1) [redacted], Dean of Students, Dunbar Senior High School, (M.P.)
2) [redacted], Special Education Teacher/Case Manager, (B.S.)
3) [redacted], Clinical Social Worker Dunbar Senior High School (M.M.)

During the expedited hearing all of the witnesses testified credibly and with candor, were not evasive, and statements were often supported by witnesses from both parties and the documents. During the present hearing, C.K. and I.H. testified to facts credibly. P lacked credibility during the present hearing as she offered contradictory testimony from the testimony she provided in the expedited hearing and, thus, all of her testimony during the present hearing is suspect.

[2] The Parties were advised that the evidence from both the expedited hearing and non-expedited hearing would be considered in the non-expedited hearing for the sake of ensuring efficiency on the administrative process. Thus, the witnesses and evidence from both hearing are recorded here.
[3] These witnesses only testified at the expedited hearing, and no additional witness testimony was provided by the Respondent for the present hearing.

In addition to the 16 exhibits entered into the record from the Petitioner in the expedited hearing, one additional exhibit was entered into evidence at the present hearing. The Petitioner's exhibits (from both hearings) are:

Ex. No.	Date	Document
P 1	11/8/12	Email from [redacted] to [redacted], et, al
	11/5/12	[Meeting notes]
	11/5/12	MDR for [Student]
	11/8/12	Letter from [redacted] to [redacted]
	11/8/12	Email from [redacted] to [redacted], et. al
P 2	11/5/12	Manifestation Determination
	[Undated]	Meeting Participants
	11/5/12	Manifestation for [Student]
P 3	11/26/12	Student Discipline Findings of Fact and Conclusions of Law (See R 1)
P 4	10/31/12	Notice of Proposed Disciplinary Action (See R 3)
	10/26/12	Letter from [redacted] to Whom It May Concern (See R 4)
	10/26/12	Administrator Statement
	11/5/12	Notice of Immediate Involuntary Transfer
P 5	1/11/12	Student Incident Report
	9/26/12	Notice of Final Disciplinary Action
	3/2/12	Notice of Final Disciplinary Action
	11/13/12	Parent/Guardian and Student Rights
P 6	Undated	Teacher Input Report
	1/6/12	[Geometry class work]
P 7	9/25/12	Email from Hecht to [redacted] et. al
	10/5/12	Email from Hecht to [redacted], et. al
	9/28/12	Email from Hecht to [redacted]
	11/2/12	Email from [redacted] to [redacted]
	11/2/12	Email from [redacted] to [redacted]
	11/30/12	Email from [redacted] to [redacted]
P 8	12/6/11	Report to Parents of Student Progress
	1/4/12	Student Timetable (BV)
	1/4/12	Transcript
	1/4/12	Letter of Understanding
	2/24/12	Report to Parents on Student Progress
	1/20/12	Report to Parents on Student Progress
	9/27/12	Report to Parents on Student Progress
	11/5/12	Transcript
	11/5/12	Letter of Understanding
P 9	1/24/12	[Behavior Intervention Plan] (See R 6)
P 10	1/29/12	Comprehensive Psychoeducational Re-evaluation
	Undated	[Report of assessment on 1/30/12]
P 11	11/2/12	IEP

Ex. No.	Date	Document
P 12	6/19/12	Assessment
P 13	2/2/12	Multidisciplinary Team (MDT) Meeting Notes
	2/2/12	Analysis of Existing Data
	1/13/12	Letter of Invitation to a Meeting
P 14	11/28/11	IEP
P 15	4/29/11	IEP
P 16	Undated	Resume [redacted], Ph.D.
P 17	December 14, 2012	[Meeting notes]

In addition to the seven exhibits entered into the record from the Respondent at the expedited hearing, 11 additional documents were entered into the record at the present hearing and are numbered R 8 though R 19.[4] The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	11/26/12	Student Discipline Findings of Fact and Conclusions of Law (See P 3)
R 2	11/5/12	[Student] MDR Meeting, 11/05/12 Paralegal Notes
R 3	10/31/12	Notice of Proposed Disciplinary Action (See P 4)
	11/13/12	Parent/Guardian and Student Rights
R 4	10/26/12	Letter from Jackson to Whom It May Concern (See P 4)
R 5	10/1/12	Parent/Guardian Letter of Invitation
R 6	1/24/12	[Behavior Intervention Plan] (See P 9)
R 7	11/26/12	Student Incident History
R 8	10/23/12	Student Participant Written Input Form
R 9	10/4/12	Service Tracker
	11/6/12	Service Tracker
R 10	2/2/12	Multidisciplinary Team (MDT) Meeting Notes
	Undated	[Discipline Report/Manifestation Determination]
R 11	2/17/12	Draft Eligibility Determination Report
	2/17/12	Final Eligibility Determination Report
R 12	2/2/12	Analysis of Existing Data
	2/9/12	Prior Written Notice – Identification
R 14	1/4/12	Parent/Guardian Letter of Invitation
	1/4/12	Student Letter of Invitation-IEP Meeting
R 15	11/28/11	IEP [Cover page]
R 16	Undated	Education Assessment for [redacted]
R 17	11/13/11	Letter of Invitation to a Meeting
R 18	10/2/11	Service Tracker
	11/7/11	Service Tracker
	12/6/11	Service Tracker
	1/10/12	Service Tracker
	2/6/12	Service Tracker

[4] R 13 was a redundant document (same as R 6) and so is not included.

Ex. No.	Date	Document
R 19	Undated	Parent Contacts for [Student]

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. 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 [redacted] with a disability who was attending Dunbar Senior High School from the fall of 2011 until his incarceration and placement by the Department of Youth Rehabilitation Services (DYRS) in the spring of 2012, and then was at Dunbar again in the fall of 2012 until his re-incarceration in November 2012.[5] He is currently in the custody of the for a matter unrelated to this case.[6] The Student is eligible for special education and related services as a result of having a condition meeting the definition of emotional disturbance.[7]
2. The Student's IEP had been revised in April 2011, and required 31.5 hours of specialized instruction, per week, outside of the general education setting, and four hours of behavioral

[5] P 14, Testimony (T) of P (all citations to testimony from P are from the expedited hearing, since the Petitioner's testimony was determined, at that time, to be credible), T of M.P, T of B.S.
[6] Undisputed Fact.
[7] P 10, P 14.

support services, per month, outside of the general education setting.[8] The IEP noted that the Student required such a segregated setting due to behavior issues.[9] This was the IEP when the Student began attending Dunbar in the fall of 2011.

3. The first semester of the 2011-2012 school year the Student was enrolled in all regular education classes, including: English III; World History/Geography 1; Geometry Part A 1.0; and Biology I.[10]

4. The Student's IEP was revised in November 2011.[11] The revision requires 26.6 hours of specialized instruction per week in the general education setting, and four hours of behavioral support services per month outside of the general education setting.[12] There is no evidence demonstrating the explanation for the significant change in programming, such as a prior written notice.

5. The second semester of the 2011-2012 school year the Student was re-enrolled in Biology I (he had failed the first semester), Geometry Part B 1.0 (he had failed both terms, but earned a "D" on the final exam, and so was passed with a "D" grade), and history and government classes (in which Respondent's Counsel was the Student's teacher), as well as a Physical Education class and Academic Support class.[13]

6. The Student was reevaluated in January 2012, and the Respondent determined the Student has "poor self-regulation and poor social skills" and that as a result "his relationships with most teachers and his age-peers are constantly strained." The Respondent also concluded:[14]

> [Student] does not possess the ability to shift and adjust his mind set and behavior to the demands and the realities of the environment.

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[8] P 15.
[9] P 15.
[10] P 8.
[11] P 14.
[12] P 14.
[13] P 8.
[14] P 10.

> Oftentimes, during class proceedings, in the cafeteria and at flextime, [Student] is disruptive, disrespectful and poorly self-regulated.
>
> [Student] disregards classroom rules and regulations. He curses. He refuses to complete deskwork. And, when re-directed to the task at hand, he walks out of classes.

When the Student is challenged by an authority figure, he becomes enraged.[15] Once the Student is escalated, he cannot control himself until he is calmed down, and he will often apologize to adults afterward.[16] The Student's cognitive functioning is far below average.[17] According to the Respondent's evaluation:[18]

- [Student's] cognitive, academic and social emotional functioning continues to regress;
- [Student's] placement in mainstream education system is not feasible at the present time;
- [Student's] below average general cognitive abilities, attentional deficits, anxiety, depressive tendencies, poor self-regulation, and inadequate social skills linger still at the core of his substandard scores in reading and math, and his failing grades.

7. A behavior intervention plan (BIP) was added to the Student's IEP in January 2012.[19] The behaviors the plan seeks from the Student include:[20]

> 1. The student will attend class daily and arrive on time, (every class period).
> 2. The student will use appropriate language when speaking to adults and peers.
> 3. The student will follow directives given to him by teachers and staff.
> 4. The student will remain on task in the classroom setting and display appropriate decorum.
> 5. Daily Attendance Contract to be given to teachers to sign[.]

The interventions to be used are:

> Teacher will review classroom expectations daily (remain in seat, work quietly, work on task and finish task, etc)
> Immediately remove the student from others when cursing. Talk to the student in the manner that you want him to talk to you.
> Teacher will employ proximity control to redirect inappropriate behavior (standing close to the student, making eye contact)
> Teacher must be consistent in expectations and consequences.
> Intervene early when the student begins to make inappropriate comments to other students, to help prevent the student from losing control.

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[15] P 1, T of M.P., T of B.S.
[16] T of I.H., T of M.P., T of B.S.
[17] P 10.
[18] P 10.
[19] R 6/P 9.
[20] R 6/P 9.

The consequences for inappropriate behavior are:

1. After school detention
2. Supervised Study
3. Will remain at the group home on the weekends
4. Will have an earlier curfew at home
5. Written referrals or incident reports
6. Revocation of privileges (playing sports, attending activities, watching television, etc)

8. During the latter part of the 2011-2012 school year the Student was placed at Abraxis by DYRS and was released in the summer of 2012.[21] Thus, no grades were issued to the Student for the latter half of the 2011-2012 school year, although third term grades were failing, but for physical education.[22] On June 15, 2012, DYRS set up a "Youth Family Team Meeting" which included the Petitioner and representatives from DYRS and the Respondent.[23] The group determined the Student would be enrolled in a school called Village Academy and that the Petitioner would "complete the application for Village Academy and submit it to the school, with the support of [redacted]"[24] Petitioner never completed the application for Village Academy and instead reenrolled the Student at Dunbar because he "begged to go back to Dunbar."[25] An IEP team never changed the Student's placement.[26]

9. During the 2012-2013 school year, when the Student was enrolled at Dunbar, he was receiving "pull-out" specialized instruction from B.S., the self-contained emotional disturbance special education teacher for between six and seven hours per week.[27] The Student was also receiving specialized instruction from another self-contained special

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[21] T of P.
[22] P 8.
[23] P 12, T of P.
[24] P 12. (Ms. Bridges is a DYRS supervisor.) T of P.
[25] T of P.
[26] The Petitioner argued that the Student's placement was to be changed, but the evidence shows no IEP team meeting and placement change prior to the 2012-2013 school year, and the Petitioner did not participate in the October 2012 team meeting. T of P.
[27] T of B.S.

education teacher for two periods during the day, [redacted].[28] The school social worker, M.M., was to provide the behavioral support services to the Student during the 2012-2013 school year, and these services were never provided.[29]

10. While he came to school regularly, the Student rarely attended class after the start of the 2012-2013 school year.[30] The Respondent attempted and did not complete a functional behavioral assessment (FBA) of the Student during the fall of 2012.[31] The Student was prevented from attending school at all for a week due to questions raised by the Respondent about his residency.[32]
11. The Student was suspended by the Principal for three days on September 26, 2012, following an incident where the Student engaged in verbal, written, or a physical threat to a person or property, including intimidating postures, despite the BIP developed by the IEP team.[33]
12. The Respondent contacted the Petitioner for an IEP team meeting in October 2012.[34] The meeting was held on October 23, 2012, with the Special Education Teacher (B.S.), a general education teacher, and a qualified representative of the Respondent.[35] The Petitioner did not participate in the meeting.[36] A revised IEP was created on November 2, 2012, and the Respondent never provided written notice of the proposed changes to the IEP to the Petitioner.[37]

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[28] T of B.S.
[29] T of M.M. (The Student refused to participate and the Respondent was not capable of addressing this behavior at Dunbar.) *See also,* T of M.P. and B.S.
[30] T of M.P., T of M.M.
[31] T of M.M. (M.M. testified that the Student's behavior of not attending class prevented him from completing the assessment of the Student's behavior.)
[32] T of M.P.
[33] P 5.
[34] T of P, T of B.S., R 19.
[35] P 11, T of B.S.
[36] T of P, T of B.S., P 11.
[37] P 11, T of B.S., T of P

13. On the morning of October 26, 2012, the Student was engaged in a disciplinary infraction which resulted in his proposed suspension.[38]

14. A team meeting was convened on November 5, 2012, to determine whether the Student's conduct on October 26, 2012, was a manifestation of his disability.[39] The team agreed that Dunbar was not the appropriate placement for the Student.[40] The team did not agree on the manifestation determination.[41] The Undersigned found, following an expedited hearing from the appeal of the manifestation determination (part of the present complaint), that the Student's behavior was a manifestation of his disability and a change of his records was ordered on December 14, 2012, as well as directions to plan for the Student's placement following his release from DYRS.[42]

15. The Student failed all of his first term classes at Dunbar during the 2012-2013 school year.[43]

16. The Student had been in a structured special education day school with small class sizes, prior to his enrollment at Dunbar, where he made educational progress.[44] Such a placement would help with both his behaviors and academics and, if it is a therapeutic environment with constantly available behavioral supports, could help the Student make a year's worth of educational progress within a year, including class attendance and academic remediation.[45] The Student's presence in a mainstream environment results in anxiety and acting out, and so is not an appropriate placement.[46] In addition, the Student's functional regression can be remedied with adult male mentoring, which with sufficient time (a minimum of 50 hours),

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[38] P 1, P 2, P 3, P 4 (This incident culminated in the expedited hearing following the filing of the present complaint.)
[39] P 1, R 2, T of I.H., T of C.K., T of M.P., T of B.S., T of M.M.
[40] P 1, R 1/P 3, R 2, T of I.H., T of C.K., T of M.P., T of B.S.
[41] R 1/P 3, R 2, P 1, P 2, T of I.H., T of C.K., T of M.P., T of B.S., T of M.M.
[42] See HOD of December 14, 2012, for Case #2012-0770 (expedited).
[43] P 8.
[44] T of I.H.
[45] T of I.H.
[46] P 10, T of I.H.

will permit the Student and the Mentor to build a positive relationship and then permit the Mentor to impart important life and social skills to the Student be being a role model and introducing the Student to appropriate leisure activities.[47]

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.

[47] T of I.H.

3. The IDEA "is violated when a school district deviates *materially* from a student's IEP." Wilson v. D.C., 770 F.Supp. 2d 270, 275 (D.D.C. 2011), *citing:* Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."); *accord* S.S. ex rel. Shank v. Howard Road Acad., 585 F. Supp. 2d 56, 68 (D.D.C. 2008); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom.* E.C. v. District of Columbia, No. 07-7070 (D.C. Cir. Sept. 11, 2007). "[T]he materiality standard *does not require that the child suffer demonstrable educational harm* in order to prevail" on a failure-to-implement claim. Wilson, at 275 (emphasis in original), *citing*: Van Duyn, 502 F.3d at 822 (emphasis added); cf. MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). "Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." Id., *See, e.g.*, Van Duyn, 502 F.3d at 822; S.S., 585 F. Supp. 2d at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

4. Placement "refers to the provision of special education and related services rather than a specific classroom of specific school." 71 Fed. Reg. 46687 (August 14, 2006). Students must be educated with non-disabled peers to the maximum extent appropriate and special classes separate schooling, or other removals of children with disabilities may occur only if the

mature or severity of the Student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved. 34 C.F.R. § 300.114(a)(2). Placement decisions must be:

> made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
> (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

Furthermore, the placement decision must be:

> determined at least annually;
> (2) Is based on the child's IEP; and
> (3) Is as close as possible to the child's home;
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
> (e) A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116. In the District of Columbia the IEP team makes the placement determination. D.C. Mun. Regs at § 5-E3001.1.

5. The Student's IEP never, in the times in question, required a segregated special education day school. The Student's IEP did require, from the start of the 2011-2012 school year until the IEP revision in November 2011, 31.5 hours per week of specialized instruction outside of the general education setting, and from the November 2011 IEP revision until the Student left the school in November 2012, 26.6 hours per week of specialized instruction in the general education setting. The 31.5 hours per week of specialized instruction outside of the general education setting was not provided. The Petitioner has not shown that the Respondent failed to provide 26.6 hours of specialized instruction in the general education setting from November 2011 until the Student was placed at Abraxis by DYRS. The Respondent did not provide 26.6 hours of specialized instruction in the general education setting during the 2012-2013 school year, until the Student left the Respondent. These failures to implement the IEP

as written were material failures as they were not minor discrepancies between what the IEP required and what was provided. In the first part of the 2011-2012 school year, all of the Student's instruction time was to be spent in a segregated special education setting, and none was. During the 2012-2013 school year, the Respondent was pulling the Student out of the general education setting and providing specialized instruction in segregated self-contained classrooms for in excess of seven hours per week. Thus, the failure to implement the IEP as written was a denial of FAPE and the Respondent failed to place the Student based on his IEP.

6. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). While IDEA lacks "any substantive standard prescribing the level of education to be accorded handicapped children[,]" such as reaching their "'full potential commensurate with [their peers,]'" the education provided must be "meaningful". Board of Educ. v. Rowley, 458 U.S. 176, 186 (*internal citation omitted),* and 189 (1982). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose and what is "meaningful" under the Act. *See:* 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. The annual goals in the IEP must be designed to "[m]eet 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[.]" 34 C.F.R. § 300.320(a)(2).

7. The Student was reevaluated in January 2012, and the results of that evaluation demonstrated that the Student was regressing cognitively, academically, and socially/emotionally. Further, the evaluation showed that the Student's "placement in [the] mainstream education system is

not feasible at the present time." This was portent to the Student's performance in the 2012-2013 school year that resulted in significant behavioral problems, including a failure to attend classes. Indeed, the Student's social/emotional issues are "at the core of his substandard scores in reading and math, and his failing grades." Thus, the Respondent's failure to revise the Student's IEP based on the data in the reevaluation resulted in a denial of FAPE because the IEP, at that point, was not reasonably calculated to enable the Student to be involved in and progress in the general education curriculum.

8. Pursuant to 34 C.F.R. § 300.321(a), an IEP team must minimally include:

> (1) The parents of the child;
> (2) Not less than one regular education teacher of the child . . .;
> (3) Not less than one special education teacher of the child . . .;
> (4) A representative of the public agency who-
> (i) Is qualified to provide, or supervise the provision of, specially designed instruction. . .;
> (ii) Is knowledgeable about the general education curriculum; and
> (iii) Is knowledgeable about the availability of resources of the public agency.
> (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section[.]

9. The Respondent invited the Petitioner to the IEP team meeting in October 2012, and she chose not to attend. The Respondent conducted the meeting with the remaining minimally required team members, with B.S. serving as both the special education teacher and individual who can interpret the instructional implications of evaluation results. However, no notice of the proposed IEP changes, pursuant to 34 C.F.R. § 300.503, was ever provided to the Petitioner, so the IEP never was in effect and the Student was no longer under the jurisdiction of the Respondent following its creation. Thus, the IEP revision is irrelevant.

10. The Respondent is required to ensure that in "evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the

child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. § 300.304(c)(6). The reevaluation conducted in January 2012 noted the Student's attention deficits, poor self-regulation, and delayed social skills. It also advised that the Student required a behavior intervention plan, which the Student already had. While a functional behavioral analysis is a tool used in practice, it is not specifically defined in law. Its use is only prescribed when an IEP team determines that a particular behavior for which a student may be disciplined was a manifestation of the student's disability. *See* 34 C.F.R. § 300.530(f). No such manifestation determination was made triggering this requirement, and there is no other basis to conclude an FBA was required and not performed, since the Respondent had identified all of the Student's special education and related service needs.

11. This hearing officer has broad discretion to 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).

12. The Student's behavior has contributed significantly to his failing grades, and the failure of the Respondent to appropriately address the Student's behavior, as well as its failure to address his cognitive deficits in line with its own evaluation data, demonstrates the harm the Respondent's violations have wrought. Thus, the Student is entitled to compensatory education services in the forms of a highly structured and therapeutic educational placement and an adult mentor, both to address the academic harm he has suffered and the lack of functional progress resulting from the Respondent's violations. This compensatory education remedy to the Respondent's denial of FAPE for the Student will be provided to the Student upon his release from DYRS.

VII. DECISON

1. The Respondent denied the Student a FAPE when it failed to provide special education to the Student in conformity with his IEP when it did not provide 31.5 hours per week of special education outside of the general education setting during the first part of the 2011-2012 school year, and did not provide 26.6 hours per week of special education in the general education setting during the first part of the 2012-2013 school year.
2. The Respondent denied the Student a FAPE when it failed to place the Student for the 2011-2012 school year based on his IEP because he was not outside of the general education setting. The Petitioner has not shown that following the revision of the IEP in November 2011 that his placement was not based on the IEP. However, the Respondent failed to place

the Student based on his IEP for the 2012-2013 school year, when he was pulled out of the general education setting for specialized instruction when his IEP required 26.6 hours of specialized instruction in the general education setting.

3. The Respondent denied the Student a FAPE when it failed to provide the Student with an IEP reasonably calculated to enable him to be involved in and progress in the general education curriculum because the IEP, following the evaluation in January 2012, lacked sufficient specialized instruction. Petitioner has not shown that the IEP revision in October 2012 was not developed by a properly constituted IEP team or lacked an appropriate BIP, but the Petitioner was never provided prior written notice of this revision and so no harm resulted as the Student's education was no longer the responsibility of the Respondent following October 2012.
4. The Petitioner has not shown the Respondent failed to sufficiently reevaluate the Student in the 2012-2013 school year because it did not conduct an FBA.

VIII. ORDER

1. The Respondent will work with DYRS and convene the IEP team, prior to the Student's release from DYRS, to review and revise the IEP (to include and address, among other things, appropriate life and social skills and appropriate leisure activity) and determine an appropriate therapeutic placement, including the identification of a school, for the Student upon his release. The placement must be in a highly structured, therapeutic, school program with behavioral supports and class sizes of less than 15 students, and must enable the Student to earn credits toward graduation as well as progress on IEP goals. The Petitioner is advised to participate with the IEP team process to have input into the decision making process about

the provision of free appropriate public education to the Student and the educational placement of the Student, and is further advised to inform her advocates about when IEP meetings are scheduled if she wishes to have their assistance.

2. The Respondent will provide the Student, upon his release from DYRS, an adult male mentor, to work with the Student at least two hours per week for 25 weeks, on building life and social skills, as detailed in the IEP, and appropriate leisure activities, as documented in the IEP.

IT IS SO ORDERED.

Date: January 17, 2013

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).