

**District of Columbia  
Office of the State Superintendent of Education**

**Student Hearing Office  
810 First Street, N.E., Suite 2001  
Washington, DC 20002**

OSSE  
Student Hearing Office  
October 29, 2013

<p><b>STUDENT', By and through PARENT,</b></p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p><b>PUBLIC CHARTER SCHOOL,</b></p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer: Charles M. Carron</p> <p>Date Issued:  October 29, 2013</p>
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**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND**

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed September 6, 2013, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, a District of Columbia Public Charter School.

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On September 9, 2013, the undersigned was appointed as the Impartial Hearing Officer.

On September 11, 2013, Petitioner filed a corrected DPC.

On September 16, 2013, Respondent filed its response, styled an “Answer,” stating, *inter alia*, that Respondent had not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on September 19, 2013 but it failed to resolve the DPC. The statutory 30-day resolution period ended on October 6, 2013.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on October 7, 2013 and will conclude on November 20, 2013.

The undersigned held a Prehearing Conference (“PHC”) by telephone on October 2, 2013, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by 6:00 p.m. on October 15, 2013, and that the Due Process Hearing (“DPH”) would be held on October 22 and 24, 2013.

No motions were filed by either party and the DPH was held on October 22, 2013 from 9:32 a.m. to 2:19 p.m. and on October 24, 2013 from 9:32 a.m. to 12:55 p.m. at the Student Hearing Office, 810 First Street, NE, Room 2008, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, the following documentary exhibits were admitted into evidence:<sup>2</sup>

Petitioner’s Exhibits:	P-1 through P-9, P-11, P-13, P-14, P-15, P-18 through P-27 and P-29 through P-42
Respondent’s Exhibits:	R-1 through R-52
Hearing Officer’s Exhibits:	HO-1 through HO-10

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<sup>2</sup> Petitioner withdrew proposed exhibit P-16. The undersigned sustained Respondent’s objections to exhibits P-10, P-12, P-17 and P-28 for reasons set forth on the record at the DPH.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) The Parent, who is the Petitioner
- (b) Special Education Specialist<sup>3</sup>

The following witnesses testified on behalf of Respondent at the DPH:

- (a) School Director
- (b) Special Education Coordinator (“SEC”)
- (c) Math Teacher #1
- (d) Math Teacher #2
- (g) Special Education Teacher

The parties gave oral closing arguments and did not file written closing arguments or briefs.

## **II. JURISDICTION**

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA’s implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. § 415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

## **III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT**

The circumstances giving rise to the DPC are as follows:

The Student is male, Current Age, and attends Current Grade at Respondent Public Charter School, which is its own Local Educational Agency (“LEA”) under the

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<sup>3</sup> Special Education Specialist was admitted, over Respondent’s objection, as an expert in the development of IEPs for children with disabilities.

IDEA. The Student has been determined to be eligible for special education and related services as a child with a disability, Other Health Impairment (“OHI”) under the IDEA.

Petitioner claims that Respondent denied Student a FAPE by improperly “exiting” him from special education for School Year (“SY”) 2012-2013, over her objection; and by failing to reinstate the Student’s IDEA eligibility and his Individualized Education Program (“IEP”) until the beginning of SY 2013-2014. Petitioner also asserts that the Student’s current IEP is deficient.

#### **IV. ISSUES**

As confirmed at the PHC, in the Prehearing Conference Summary and Order issued October 2, 2013 (the “PHO,” HO-10) and in opening statements at the DPH, the following issues were presented for determination at the DPH:

(a) Did Respondent deny the Student a FAPE by exiting the Student from specialized instruction and related services at a meeting held on or about October 9, 2012?

(b) Did Respondent deny the Student a FAPE by failing to reinstate his IEP prior to August 12, 2013, pursuant to Petitioner’s requests made between October 9, 2012 and August 6, 2013?

(c) Did Respondent deny the Student a FAPE because the Student’s IEP developed on or about August 6, 2013:

(i) fails to provide the Student with academic goals including goals in the area of mathematics and

(ii) fails to provide the Student with sufficient specialized instruction outside general education to address his disabilities and allow him to access the general education curriculum?

## V. RELIEF REQUESTED

Petitioner requests the following relief:<sup>4</sup>

- (a) a finding that Respondent denied the Student a FAPE;
- (b) an Order that Respondent revise the Student's IEP to include (i) one hour per day of specialized instruction outside the general education setting, (ii) ten hours per week of specialized instruction in the general education setting, and (iii) academic goals; and
- (c) compensatory education, specifically 100 hours of academic tutoring in his academic areas of need and a therapeutic camp to address his social and behavioral areas of need (peer relations, conflict resolution, social skills, problem solving and coping skills).

## VI. FINDINGS OF FACT

### Facts Related to Jurisdiction

1. The Student is a male, Current Age. R-39-1.<sup>5</sup>
2. The Student resides in the District of Columbia. *Id.*

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<sup>4</sup> In the DPC, Petitioner also requested an award of attorney's fees, which the undersigned lacks the authority to award. At the PHC, as reflected in the PHO (HO-10), Petitioner also had requested an Order that Respondent conduct an updated Functional Behavioral Assessment ("FBA") of the Student and an Order that, upon completion of the FBA, Respondent reconvene the Student's Multi-Disciplinary Team ("MDT") to develop a Behavior Intervention Plan ("BIP") and discuss additional behavioral support services that might be warranted based upon the FBA; however, Petitioner withdrew these requests on the record at the DPH.

<sup>5</sup> When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with OHI. *Id.*

The Student's Evaluations, Eligibility Determinations and IEPs Prior to October 2012

4. In January 2006, the Student was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). R-1-1.

5. In April 2006, a developmental service diagnostic summary of the Student confirmed the ADHD diagnosis and recommended a medication review and school accommodations. P-36, R-4-8.

6. In May 2006, the LEA that the Student then attended performed a developmental assessment of the Student and determined that his cognitive abilities were at the high end of the Average range, but his personal-social development was at the low end of the Average range and considerably lower than that on the sub-domains of Adult Interaction and Peer Interaction. R-4-5.

7. In May 2006, the LEA that the Student then attended determined that the Student was eligible for special education based upon the primary disability category of OHI; however, in June 2006 Petitioner refused an IEP for the Student and stated that she would enroll him in a private school. Testimony of Petitioner, R-4-1, R-5-1 and -2.

8. In 2008, the Student was diagnosed with Oppositional Defiant Disorder ("ODD"). R-1-1.

9. In October 2009, the LEA that the Student then attended agreed to evaluate him for eligibility for special education. R-4-1.

10. In January 2010, a psycho-educational evaluation of the Student concluded that his general cognitive abilities were in the Superior range although he had relative weaknesses in visual-spatial processing, non-verbal reasoning, processing of visual material quickly, and his ability to sustain attention and concentration. R-1-13, R-4-1.

11. The January 2010 evaluation concluded that the Student's academic abilities were generally in the Superior to Very Superior range, with relative weakness in math reasoning. R-1-14.

12. In February 2010 the LEA that the Student then attended determined that he was not eligible for special education because, despite having ADHD, his cognitive and achievement scores were at or above his same aged peers and he appeared to be capable of learning in the school with minimal redirection. R-4-1 and -2.

13. On March 18, 2010, Neurologist wrote a letter "To whom it may concern" stating, *inter alia*, that she had evaluated the Student that day for ADHD and anger control difficulties and behavior problems. P-4-1.

14. Neurologist's March 18, 2010 letter recommended "a small structured class with structure carried into recess time and the use of behavior modification techniques rewarding him for good behavior and achievement of pre-set goals" as well as "help with his mathematics skills which are behind grade level." *Id.*

15. The record is devoid of evidence that Neurologist's March 18, 2010 letter was provided to the LEA he then attended.

16. In April and May of 2010, the Student's teachers reported an increase in his problem behaviors and difficulty completing assignments. The LEA that the Student then

attended agreed to reconvene a meeting at the start of SY 2010-2011 to revisit the Student's eligibility for special education. R-4-2.

17. The record is devoid of any evidence of any eligibility meetings between May 2010 and March 2011.

18. In March 2011 the LEA that the Student then attended determined that the Student was eligible for special education based upon the primary disability category of OHI. R-2-1.

19. In April 2011, the Student's initial IEP provided him with five hours per week of specialized instruction in the general education setting to assist him in staying focused, sequencing and completing tasks, and keeping his "things in order." R-2-2 and -3.

20. Between January and June 2011, the Student's behavior improved, with no incidents of physical fights, playing with knives, bullying, or cruelty to people or animals; Petitioner attributed this improvement to the Student's treatment for ADHD. R-4-13.

21. During SY 2010-2011 the Student scored "Advanced" on the Math portion and "Proficient" on the Reading portion of the District of Columbia Comprehensive Assessment System ("DC CAS"). R-47-5.

22. In June 2011, an academic achievement evaluation of the Student concluded that his overall level of achievement was Superior, with relative weaknesses in math and oral language. R-3-4.

23. In June 2011, an independent clinical evaluation of the Student noted that Neurologist had diagnosed him with partial complex seizures that could cause personality changes such as aggression, irritability and talkativeness. R-4-5.

24. Neurologist's June 2011 clinical evaluation found the Student's inhibition and impulse control and judgment to be fair to poor. R-4-8 and -12.

25. Neurologist's June 2011 clinical evaluation identified possible frontal lobe deficits that could explain his aggression, hyperactivity, inattentiveness, and disorganization. R-4-12 and -13.

26. Neurologist's June 2011 clinical evaluation concluded that the Student's learning or other health impairment prevented him from earning grades commensurate with his intellectual capacity or aptitude. R-4-13.

27. Neurologist's June 2011 clinical evaluation confirmed the diagnoses of ADHD and ODD and opined that these conditions caused "clinically significant impairment in social and academic functioning." *Id.*

28. Neurologist's June 2011 clinical evaluation recommended "full time special education services," a positive behavior support plan, counseling, follow up with the neurologist to manage seizures, ADHD medication management, referral to a neuropsychologist to "pinpoint" the Student's executive functioning deficits, and opportunities to participate in structured recreational activities of his interest. R-4-14 and -15.

29. In July 2011, the school psychologist at the LEA that the Student then attended reviewed Neurologist's clinical evaluation and identified many alleged inaccuracies (R-5); however the school psychologist agreed with the diagnosis of ADHD, noting that the Student's lack of patience in math "appears to be a major contributor to his mathematics difficulties...." (R-5-5).

30. In July 2011, the school psychologist at the LEA that the Student then attended recommended that the Student's IEP be amended to add math goals but did not agree that he required a more restrictive environment. R-5-5.

31. On August 26, 2011, the Student's Multi-Disciplinary Team ("MDT") at the LEA he then attended held a meeting at which (a) the Student's math tutor reported that he no longer required remedial math help or tutoring in math; (b) the Student's teachers reported that he had progressed three grade levels in reading during the previous school year; and (c) the Student's evaluations were reviewed. R-6.<sup>6</sup>

32. The record is devoid of any evidence of the Student's academic performance, behavior, or specialized instruction for the first half of SY 2011-2012.

33. On January 12, 2012, the Student's MDT at the LEA he then attended held a meeting to review a DPC against that LEA. R-7.

34. At the January 12, 2012 MDT meeting, Petitioner's educational advocate agreed that the Student did not require a Functional Behavioral Assessment ("FBA"). R-7-2.

35. A settlement of the then-pending DPC was reached at the January 12, 2012 MDT meeting, providing for additional independent evaluations of the Student. R-7, R-8-1 and -2. The settlement agreement was amended on February 25, 2012 and again on March 1, 2012. R-8-3 and -4.

36. On March 30, 2012, the Student's IEP Team at the LEA he then attended met for the annual review of his IEP. R-9-1.

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<sup>6</sup> This exhibit is truncated so the undersigned cannot determine from R-6 what action the MDT decided to take or not take, nor was there testimony on this point.

37. As of March 30, 2012, the LEA the Student then attended had not received the evaluations that had been authorized pursuant to the settlement of the prior DPC. R-9-6.

38. The Student's IEP developed on March 30, 2012, provided one hour per week of specialized instruction in the general education setting for the period March 30, 2012 through March 29, 2013, and an additional three hours per week of specialized instruction in the general education setting for the period August 27, 2012 through March 29, 2013. R-9-4.

39. The Student's IEP developed on March 30, 2012, recited the terms of the settlement of the prior DPC including the compensatory education provided under that settlement. R-9-6.

40. On April 5, 2012, an independent educational evaluation of the Student found that he scored above grade level on all achievement tests, exhibiting no particular weaknesses or anomalies, and his scores in math were Superior. R-10-2 and -4.

41. During educational testing on April 5, 2012, the Student's attention span was excellent and he neither requested nor took breaks. R-10-2.

42. In March and April 2012, an independent neuropsychological evaluation of the Student was conducted, including two classroom observations, with a report issued April 17, 2012. R-11.

43. The April 17, 2012 report concluded that the Student's performance on memory tasks was greatly affected by his attention and motivation, and recommended that spoken presentations be presented "in very brief, organized chunks, repeated, and accompanied by visual illustrations." R-11-10 and -11.

44. In the area of social-emotional functioning, based on teacher ratings, the April 17, 2012 report concluded that the Student had a Clinically Significant concern regarding Aggression and that he was At Risk for Hyperactivity and Conduct Problems, inasmuch as he exhibited a pattern of disruptive and problematic behaviors in the classroom.

R-11-11.

45. The April 17, 2012 report also concluded that the Student's ADHD continued to impact his functioning to some degree "particularly with regard to the effective utilization of working memory skills." *Id.*

46. The April 17, 2012 report confirmed the prior diagnoses of ADHD and ODD, as well as partial complex seizures. *Id.*

47. The April 17, 2012 report recommended "a highly structured and supportive academic placement whereby [the Student's] attentional, behavioral, and emotional needs may be met." R-11-12.

48. The April 17, 2012 report contained specific recommendations regarding classroom accommodations. *Id.*

49. For SY 2011-2012, the Student scored "Proficient" on both the Math and Reading portions of the DC CAS. R-47-5.

50. On May 22, 2012, the Student's MDT at the LEA he then attended met to review the neuropsychological and educational evaluations and to "close out" the settlement of the prior DPC. R-12.

51. The Student enrolled in the Public Charter School (*i.e.*, Respondent) for SY 2012-2013.

The October 9, 2012 IEP Team Meeting and the Results Thereof

52. As of October 9, 2012, the Student was not doing his homework regularly and had some difficulty sitting quietly and attending in class (R-13-1) and he was falling behind on his math homework (Testimony of Math Teacher #1).

53. Sometime prior to October 9, 2012, Petitioner expressed her concerns about the Student's performance in the classroom. Testimony of School Director.

54. On October 9, 2012, the Student's IEP Team met to review the Student's IEP from his previous LEA. R-13, testimony of School Director.

55. At the October 9, 2012 meeting, Respondent's representatives on the IEP Team proposed to implement a [Rehabilitation Act of 1973] "Section 504" plan for the Student rather than an IEP because the objectives and goals set out in the IEP mostly pertained to the Student's organization and behavior, which they believed could be addressed more flexibly through a "Section 504" plan. R-13-1 and -2, testimony of School Director.

56. It is undisputed that no assessments or evaluations of the Student were reviewed at the October 9, 2012 meeting. Testimony of Petitioner, testimony of School Director.

57. Based upon all of the evidence in the record, the undersigned finds that the IEP Team that met on October 9, 2012 knew the Student had been found eligible for special education and had an IEP at his previous LEA, but the IEP Team failed to determine the Student's prospective eligibility based upon a review of any assessments or evaluations of the Student.

58. The record is devoid of any evidence that Respondent's representatives on the IEP Team notified Petitioner before, at or after the October 9, 2012 meeting of any of the following: (a) that no additional data were needed to determine whether the Student continued to be a child with a disability and to determine his child's educational needs, (b) the reasons for that determination, or (c) Petitioner's right to request an assessment to determine whether the Student continued to be a child with a disability and to determine the child's educational needs.

59. The IEP Team provided Petitioner a Final Eligibility Determination Report and a Prior Written Notice stating that the Student did not meet the eligibility criteria for special education and that he did not need special education and related services, without stating any basis for those conclusions. R-14.

60. All of the accommodations from the Student's IEP at his prior LEA were to be incorporated into the Student's "Section 504" plan; however, the specialized instruction provided in the IEP apparently was to be discontinued. R-15-1.

61. On October 9, 2012, Petitioner signed a Withdrawal from Special Education form stating as follows:

I, as parent or legal guardian of the student identified above, request that my child be withdrawn from special education. I have been advised of my special education safeguards.

R-16-1.

62. School Director initially testified that Respondent's representatives at the October 9, 2012 meeting "may not have" explained to Petitioner that moving the Student from an IEP to a "Section 504" plan would result in him no longer receiving the four hours per week of specialized instruction specified in his IEP. Testimony of School

Director. Petitioner testified that there was no discussion of the elimination of the hours of specialized instruction. Testimony of Petitioner. Respondent's notes of the meeting (R13) are silent on this topic. Petitioner took no notes of the meeting. In response to a question from the undersigned, School Director modified her testimony and stated that Respondent's SEC had told Petitioner that the main difference between an IEP and a "Section 504" plan was that there would not be specialized instruction under the latter. Although Petitioner has the burden of proof (*see* Section VII *infra*) and her credibility has been found lacking (*see* Section VIII *infra*), based upon School Director's conflicting testimony and the lack of any mention of eliminating specialized instruction in Respondent's notes of the IEP Team meeting, the undersigned finds that Respondent failed to inform Petitioner that the "transition" from an IEP to a "Section 504" plan would eliminate the Student's specialized instruction.

63. There is no evidence in the record that Respondent explained to Petitioner what other services might no longer be provided or assured, or what additional services such as behavioral support services might not be made available under a "Section 504" plan that would have been provided under an IEP depending upon the Student's needs. Nor is there any evidence that Respondent explained to Petitioner that by agreeing to "transition" the Student's IEP to a "Section 504" plan, Petitioner would not be able to file a DPC if Respondent failed to implement the promised services, supports and/or accommodations.

64. Based upon all of the record evidence, the undersigned finds that Petitioner's agreement to withdraw the Student from special education was not fully informed. Accordingly, the undersigned finds that Petitioner did not waive her right to an

assessment, or to evaluation or reevaluation of the Student's eligibility, or to special education for the Student.

The Events of October 10, 2012 through the Filing of the DPC on September 6, 2013

65. On November 5, 2012, the Student was suspended. P-13-1.

66. Petitioner testified that after this suspension she met with School Director and expressed Neurologist's recommendation that the Student should be sent to a school psychologist when he misbehaved, rather than being suspended. Testimony of Petitioner. Petitioner testified that at the same meeting, she said to School Director, "you said you'd implement his IEP but I don't see it . . . You're treating him worse than before I signed away his IEP. I said 'maybe you should put his IEP back in place.' She said nothing." *Id.* For the reasons explained in Section VIII *infra*, the undersigned does not credit this testimony.

67. On November 16, 2012, Respondent sent Petitioner an Evaluation Summary Report stating, *inter alia*, that Petitioner "was in agreement with team decision and signed withdrawal from Special Education form." R-14-3.

68. The record is devoid of any evidence of a reply by Petitioner.

69. Petitioner testified that she made numerous requests to Respondent to reinstate the Student's IEP, but she "felt like the school was ignoring me no matter how much I begged them to reinstate his IEP." Testimony of Petitioner. Petitioner testified that she told School Director, "please put my son back on his IEP; he's going crazy, this is not my son." *Id.* Petitioner could not recall when these meetings allegedly occurred. *Id.* For the reasons explained in Section VIII *infra*, the undersigned does not credit Petitioner's

testimony that she made such requests, or that she was ignored by School Director or other representatives of Respondent.

70. On November 26, 2012, Neurologist wrote a letter “To whom it may concern” stating, *inter alia*, that she was treating the Student with medication for ADHD and partial complex seizures and behavior problems. P-3-1.

71. Neurologist’s November 26, 2012 letter described the Student’s increased medication dosages and recommended “a small structured classroom with greater one on one instruction and supervision [and] behavior modification and counseling sessions to improve his behavior.” *Id.*

72. Neurologist’s November 26, 2012 letter stated that the Student continued to need annual IEPs and evaluations. *Id.*

73. The record is devoid of any documentary evidence that Neurologist’s November 26, 2012 letter was provided to Respondent.<sup>7</sup>

74. On November 27, 2012, Special Education Specialist, who at that time was Petitioner’s educational advocate, emailed Respondent requesting permission to conduct a classroom observation of the Student and provided Respondent with Petitioner’s written authorization. P-26-1.

75. Special Education Specialist reiterated the request via email on December 4, 2012. P-26-2.

76. School Director responded to Special Education Specialist and arranged for the observation (P-25), which took place on December 18, 2012 (P-34-2, P-41-1).

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<sup>7</sup> Petitioner testified that she provided this letter to Respondent, but for the reasons discussed in Section VIII *infra*, the undersigned does not credit this testimony.

77. According to her Classroom Observation Report, Special Education Specialist observed the Student speaking with other students despite his teachers' efforts to redirect him, kept his school materials disorganized, hit two pencils together for three minutes and talked to another student without the teacher redirecting him, leaned back in his chair balancing on two of its legs, transitioned slowly, and sat for some minutes with his coat over his head. P-41-1 and -2.

78. Special Education Specialist's Classroom Observation Report concluded that the Student's decreased ability to focus on assigned tasks or directions had a direct impact on his academic performance, with his grade averages for the first two grading periods comprising Fs in Algebra and English, a D in Biology and a B in Robotics. P-41-2 and -3.

79. Special Education Specialist's Classroom Observation Report recommended a "small structured learning environment with effective positive behavioral supports," with a teacher to student ratio of ten to one (10:1) and reduced distracting stimuli; that the Student receive an updated FBA and Behavior Intervention Plan ("BIP"); and that eligibility for special education services be re-addressed because his academic achievement scores were not commensurate with his projected achievement scores, suggesting that the "Section 504" plan was inappropriate. P-41-3.

80. The record is devoid of evidence that Special Education Specialist's Classroom Observation Report was provided to Respondent. In view of Petitioner's burden of proof (*see* Section VII *infra*), the undersigned finds that Petitioner has not established that this report was provided to Respondent.

81. On December 19, 2012, an undefined group met to discuss how the Student was functioning in the classroom. R-18.

82. As of December 19, 2012, the Student was frequently distracted and required redirection and he often talked out of turn and distracted other students. R-18-1 and -2, testimony of Petitioner.

83. As of December 19, 2012, the Student had been suspended twice. R-18-3, testimony of Petitioner.

84. In December 2012, School Director met twice with Special Education Specialist. Testimony of School Director. Petitioner testified that she attended one of those meetings. Testimony of Petitioner. Petitioner and Special Education Specialist testified that at those meetings one or both of them requested that Respondent reinstate the Student's IEP. Testimony of Petitioner, testimony of Special Education Specialist. School Director testified that no request to reinstate the Student's IEP was made at either of the meetings she had with Special Education Specialist in December 2012. Testimony of School Director. For the reasons explained in Section VIII *infra*, the undersigned credits the testimony of School Director over that of Petitioner and Special Education Specialist, and finds that no such request to reinstate the Student's IEP was made in December 2012.

85. As of the end of the SY 2012-2013 second grading period, the Student's grades were as follows:

Algebra/Geometry	F/50
Logic 7	D/62
Robotics	B/80
Physics 7	D/63
Chemistry 7	C/70
Biology 7	D/64
English 7	F/47
French 7	B/84
World History 1	C/76

R-52-1.

86. On January 16, 2013, Special Education Specialist emailed School Director suggesting dates at the end of the month for a meeting "to address some of the academic and behavioral concerns and supports." P-24-1.

87. The undersigned finds that Special Education Specialist's January 16, 2013 email did not constitute a request to reinstate the Student's IEP.

88. Special Education Specialist testified that she sent a letter to School Director in January 2013 stating that the Student needed his IEP back in place. Testimony of Special Education Specialist. No such letter was introduced into evidence. School Director testified that she never received a letter or email from Special Education Specialist requesting an IEP for the Student. For the reasons discussed in Section VIII *infra*, the undersigned credits the testimony of School Director over the testimony of Special Education Specialist, and finds that no such letter was received by School Director.

89. On January 22, 2013, School Director responded that due to exams, the proposed dates were not acceptable, but the first week in February would be. P-24-2.

90. On January 31, 2013, Special Education Specialist responded to School Director requesting that the meeting be held on February 6, 2013 “to discuss [the Student’s] academic and behavioral educational supports.” P-24-2.

91. The undersigned finds that Special Education Specialist’s January 31, 2013 email did not constitute a request to reinstate the Student’s IEP.

92. After an additional exchange of emails, the meeting date was set for February 12, 2013. P-24-3 through -5.

93. On February 7, 2013, Special Education Specialist emailed School Director requesting, *inter alia*, that an FBA be completed so that a BIP could be implemented for the Student. P-23-1.

94. The undersigned finds that Special Education Specialist’s February 7, 2013 email did not constitute a request to reinstate the Student’s IEP.

95. As of the end of the SY 2012-2013 third grading period, the Student’s grades were as follows:

Algebra/Geometry	F/50
Logic 7	C/70
Robotics	B/80
Physics 7	D/64
Chemistry 7	C/78
Biology 7	B/82
English 7	F/59
French 7	C/72
World History 1	F/59

R-52-1.

96. On February 14 and 15, 2013, the Student was suspended (P-13-3) and School Director provided documentation of the incident to Special Education Specialist (P-24-5).

97. On February 15, 2013, Special Education Specialist emailed School Director asserting that Respondent had violated the Student's civil rights by discriminating against him and failing to provide appropriate accommodations.<sup>8</sup> R-19-4 and -5.

98. The undersigned finds that Special Education Specialist's February 15, 2013 email did not constitute a request to reinstate the Student's IEP.

99. On February 17, 2013, Respondent's counsel replied to Special Education Specialist, advising that she had been retained by Respondent, and requesting a meeting to discuss Petitioner's concerns. R-19-4.

100. Special Education Specialist and Respondent's counsel spoke by telephone on February 20, 2013. R-19-3.

101. On February 22, 2013, Special Education Specialist emailed Respondent's counsel stating that Petitioner agreed with a proposed "interim behavior plan" and asking whether the psychologist (presumably referring to School Psychology Associate) would be able to meet with the Student . R-19-2.

102. On February 25, 2013, Respondent's counsel emailed Special Education Specialist to inform her that she would be sending a draft of the interim behavior plan "early this week" and that the school psychologist spoke to Petitioner about her concerns and that counseling for the Student would begin that week. R-19-2.

103. On March 6, 2013, Special Education Specialist emailed Respondent's counsel stating that she had not received "anything from the school regarding any interventions that would be used to address any behavioral concerns as agreed," and that she had not received any information regarding the FBA that was requested. R-19-1.

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<sup>8</sup> Apparently Special Education Specialist was asserting a claim under the Rehabilitation Act of 1973, a statute that is not within the jurisdiction of the undersigned.

104. On March 8, 2013, Respondent's counsel emailed Special Education Specialist the draft interim BIP (R-20) and stated that she would follow up regarding the FBA, which she believed was "in process" (R-19-1).

105. On March 15, 2013, Special Education Specialist emailed School Director again alleging that Respondent was violating the Student's civil rights by removing the Student from class in lieu of other interventions, and requesting documentation. R-21-3 and -4.

106. On March 17, 2013, Respondent's counsel responded to Special Education Specialist stating, *inter alia*, that she had not received any response to the draft interim BIP, and that she would obtain the requested documents. R-21-3.

107. On March 17, 2013, Special Education Specialist responded to Respondent's counsel stating that she and Petitioner had assumed the interim BIP had been implemented. R-21-2.

108. On March 19, 2013, Respondent's counsel responded to Special Education Specialist, stating, *inter alia*, that the school had implemented the interim BIP and describing the two occasions on which the Student had been removed from the classroom for half a day for "Academic Redirection" because he had failed to complete his math homework, had failed to make up the homework after school during "Math Rebound," and had failed to attend "Saturday Detention" due to Petitioner's refusal to bring him. R-21-1 and -2.

109. The Student repeatedly failed to complete his math homework (P-11-2 through -10), sometimes served “Math Rebound” after school as a result (P-32-1 and -2), and sometimes failed to attend “Math Rebound” when assigned to do so (P-19-1) despite many reminders (Testimony of School Director).<sup>9</sup>

110. The Student would forget his Communication Journal (“CJ”) where the reminders to attend “Math Rebound” had been written. Testimony of School Director.

111. Even when the Student attended “Math Rebound” or other remedial sessions after school, he was not productive, unless a teacher was sitting next to him working with him on his math homework. Testimony of Math Teacher #1.

112. Math Teacher #1, who is a general education teacher, could not pinpoint the Student’s problems with completing his math homework. Testimony of Math Teacher #1. She placed him in the front row of the classroom between students who could help him, and she consistently redirected the Student when he engaged in distracted or distracting behavior in the classroom. *Id.* Otherwise, she used the same strategies to teach him as she used to teach the rest of the class of approximately 22 students. *Id.*

113. During SY 2012-2013, the Student’s math test scores dropped from Bs to Ds, then “lower,” in direct correlation to his failure to complete homework. *Id.*

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<sup>9</sup> Petitioner testified that at the end of the school day, the Student was mentally tired (although not physically tired), had headaches, and was unable to focus on his math homework at “Math Rebound” or in the evening at home. School Director testified that the Student only once had stated that he had missed “Math Rebound” because he was tired or had a headache; the other times, he said he had forgotten. Testimony of School Director. Math Teacher #1 testified that the Student never told her that the reason he had not completed his math homework was that he was too tired; rather, he told her that he had forgotten or he had just “stopped.” Testimony of Math Teacher #1. For the reasons explained in Section VIII *infra*, the undersigned credits the testimony of School Director and Math Teacher #1 over the testimony of Petitioner.

114. Based upon all of the record evidence, the undersigned finds that assigning the Student to attend “Math Rebound,” and reminding him to do so, did not provide sufficient support for him to focus on and complete his math homework, given his ADHD. Rather, due to his disability, he required specialized instruction in math. *See*, Findings of Fact 190, 195 and 197-203, *infra*.

115. Respondent’s counsel advised Special Education Specialist on March 19, 2013, that the FBA would be completed and sent to her the following week, after which a meeting would be scheduled to review the FBA “as well as any other information that has been gathered related to the BIP implementation and effectiveness.” R-21-2.

116. The FBA was conducted by Psychologist and School Psychology Associate, both of whom work for a psychology services company apparently on contract to Respondent, on February 20, 2013 and March 20, 2013, and a report was issued on April 4, 2013. R-22-1.

117. As of March 27, 2013, the Student had received 20 “referrals” for inappropriate behaviors, most of them occurring on Mondays and Wednesdays between 1:00 p.m. and 2:00 p.m., and most occurring prior to March 2013. R-22-1 and -2, R-48, P-9.<sup>10</sup>

118. Petitioner testified that she spoke with School Director about Respondent’s practice of sending the Student to “the office,” asking “if you take him out of the classroom, how will he keep up?” in response to which Petitioner testified that School

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<sup>10</sup> The Student had two additional “referrals” for the remainder of SY 2012-2013. R-48-1.

Director “would just ignore me.” For the reasons explained in Section VIII *infra*, the undersigned does not credit this testimony.

119. As of April 4, 2013, the Student had a habit of “calling out” in class approximately two times per class period, occasionally disrupting the rest of the class. R-22-2, -3.

120. As of April 4, 2013, the Student often failed to follow teachers’ directions on the first request. R-22-3.

121. The April 4, 2013 FBA report recommended that the Student continue to receive school-based accommodations and services, as specified in the report, including alternating tasks that the Student found boring or tedious with those he found interesting, engaging or easier; teaching him when he was “cognitively available” and repeating instructions and course material when he was not “cognitively available”; giving him explicit instructions on how to effectively complete assignments; giving him increased structure and organization; allowing him to “preview” lessons; providing him checklists; setting intermediate deadlines for projects and checking his progress; breaking down tasks; providing examples or work samples; assisting the Student in generating multiple possible solutions to problems; and implementing a system other than hand-raising to obtain help or contribute to classroom discussion. R-22-5.

122. On April 5, 2013, Respondent’s counsel emailed the FBA report to Special Education Specialist and stated that she would be back in touch the following week to schedule a meeting to discuss the FBA. P-22-1.

123. Later on April 5, 2013, Special Education Specialist emailed the FBA to Petitioner, who responded to Special Education Specialist that she wanted to reinstate the

Student's IEP and instructed Special Education Specialist to so notify Respondent's counsel. P-22-2 and -3.

124. Later on April 5, 2013, Special Education Specialist responded to Petitioner as follows: "Yes ma'am. When we schedule the meeting we will request the IEP. Definitely." P-22-3.

125. Based upon the entire record, and especially the email exchange of April 5, 2013, the undersigned finds that neither Petitioner nor Special Education Specialist had made a request to Respondent between October 9, 2012 and April 5, to reinstate the Student's IEP; had either of them already made such a request, she would have referred to it in her April 5, 2013 email rather than phrasing the request to reinstate the Student's IEP as prospective.

126. On April 9, 2013, Respondent's counsel emailed Special Education Specialist suggesting a meeting on April 15, 2013 to review the FBA. R-23-8.

127. Later on April 9, 2013, Special Education Specialist replied to Respondent's counsel stating that she would determine Petitioner's availability and if Petitioner was not available on the suggested date, she would suggest alternatives. R-23-7.

128. In none of the emails to Respondent's counsel about scheduling the meeting to discuss the FBA did Special Education Specialist state that Petitioner wanted the Student's IEP reinstated. P-22.

129. On April 10, 2013, Special Education Specialist discussed the Student with School Psychology Associate. P-21-1.

130. On April 12, 2013, Special Education Specialist emailed School Psychology Associate the Student's current psychological evaluative data and his 2011 IEP at his prior LEA. *Id.*

131. In the April 12, 2013 email, Special Education Specialist stated that Petitioner and she agreed that the Student required a "comprehensive and appropriately calculated IEP." *Id.*

132. The undersigned finds that this email, addressed to a contractor providing professional services to Respondent but apparently having no responsibility for Respondent's compliance with IDEA, without a copy to Respondent's counsel, did not constitute a request by Petitioner for Respondent to reinstate the Student's IEP.<sup>11</sup>

133. On April 15, 2013, not having heard back from Special Education Specialist, Respondent's counsel emailed her to confirm that the meeting was not occurring that date and asking for alternative dates. R-23-7.

134. Special Education Specialist and Respondent's counsel exchanged additional emails between April 15 and 29, 2013, proposing dates and times to meet, finally agreeing on May 8, 2013.<sup>12</sup> R-23-1 through -7.

135. Based upon the entire record and particularly the exchange of emails between Special Education Specialist and Respondent's counsel concerning the FBA and

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<sup>11</sup> The undersigned alerted Petitioner's counsel, at the commencement of the DPH, of the need for testimony to establish that School Psychology Associate was an agent of Respondent for this purpose; however, no such testimony was introduced and none of the documentary evidence establishes such a relationship. Meanwhile, Special Education Specialist knew the identity of Respondent's counsel, had corresponded with her via email numerous times, and had spoken with her by telephone.

<sup>12</sup> The meeting notes are dated May 7, 2013 (R-24-1) but this appears to be a typographical error.

a meeting to discuss the FBA, as well as Petitioner's emails to the Student's teachers and School Director requesting various accommodations but not even mentioning "IEP" (P-24, P-29-1, P-31-1), the undersigned finds that Respondent was not on notice prior to the May 8, 2013 meeting that Petitioner wanted the Student's IEP to be reinstated.<sup>13</sup>

136. As of May 8, 2013, the Student had a failing mid-term grade in math, *i.e.*, 54, was talking out a lot in class, was not regularly following teachers' directions on the first request, was not regularly completing his interim-BIP "goal sheet," and was not completing his homework. R-24-2 and -3. Respondent's staff reminded the Student repeatedly to attend "Math Rebound" to complete his math homework, but he did not attend regularly. Testimony of School Director.

137. The attendees at the May 8, 2013 meeting agreed to review the Student's evaluations and data over the next two days and then decide if additional evaluations were required. R-24-4.

138. On May 8, 2013, the Student's interim BIP was revised. R-25.

139. On May 8, 2013, after the meeting, Respondent's counsel emailed Special Education Specialist requesting copies of the prior educational and neuropsychological evaluations. R-26-3.

140. On May 13, 2013, Special Education Specialist wrote a letter to Respondent's counsel asserting Petitioner's request "to revise her son's IEP supports." R-27-1.

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<sup>13</sup> Petitioner may well have believed at the time that her representative during that period, Special Education Specialist, had followed her instruction and made such a request. For the reasons discussed in Section VIII *infra*, the undersigned does not credit Special Education Specialist's testimony that she made such requests between November 2012 and May 8, 2013.

141. The May 13, 2013 letter asserted that in October 2012, Respondent had “inappropriately recommended” a “504 Plan” in lieu of an IEP for the Student, and that Respondent had failed to provide the same “supports” under the “504 Plan” as under the IEP. R-27-1.

142. The May 13, 2013 letter stated that Petitioner requested the Student’s IEP be “revised” and that he receive services as a student eligible under the IDEA without any further evaluations. R-27-1.

143. After exchanging emails about locating the prior evaluations, Respondent’s counsel emailed Special Education Specialist on May 16, 2013, to advise that the evaluations had been located and would be reviewed by Respondent’s psychologists, who would advise whether additional evaluations would be required. R-26-1.

144. On May 20, 2013, Special Education Specialist reiterated Petitioner’s request for a meeting to “revise” the Student’s IEP (R-28-1) and Respondent’s counsel responded that she was working with Respondent to identify dates for a meeting to review the available evaluations and to determine eligibility, or whether additional information was needed to determine eligibility. R-28-1.

145. On May 23, 2013, \_\_\_\_\_ informed Respondent’s counsel that she was representing Petitioner and that Special Education Specialist no longer would be working on this matter. R-29-3 and -4.

146. On May 24, 2013, \_\_\_\_\_ emailed Respondent’s counsel asserting, *inter alia*, that the Student’s IEP “was taken away from him without following proper procedures and without justification,” and that it should not be necessary “to go through the entire eligibility process again.” R-29-2.

147. On May 30, 2013, Respondent’s counsel proposed June 10, 2013 for the meeting. R-29-1 and -2.

148. For SY 2012-2013, the Student scored “Advanced” on the Math portion and “Proficient” on the Reading portion of the DC CAS. R-47-5.

149. For SY 2012-2013, the Student’s final grades were as follows:

Algebra/Geometry	F/54
Logic 7	D/64
Robotics	B/81
Physics 7	D/69
Chemistry 7	D/66
Biology 7	C/73
English 7	C/70
French 7	C/76
World History 1	D/67
PE-Martial Arts	A/95

TOTAL AVERAGE C/71.4

150. The Student also failed his SY 2012-2013 comprehensive examination in math.<sup>14</sup> Testimony of School Director.

151. Based upon all of the record evidence, the undersigned finds that the lack of specialized instruction during SY 2012-2013 caused the Student to fail his math class, *i.e.* Algebra I. The undersigned finds that the Student would have completed his math homework—or a significantly larger portion thereof—if he had been provided such specialized instruction.

152. It also is reasonable to assume that if the Student had an IEP during SY 2012-2013, his FBA would have been completed earlier and his BIP implemented earlier, thereby reducing the frequency of his misconduct and disciplinary referrals. However, Petitioner introduced no evidence to tie the Student’s misconduct to a lack of behavioral

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<sup>14</sup> Apparently this is Respondent’s own school-year-end test, not the DC CAS.

support services that would have been provided under an IEP. Accordingly, based solely upon the record, given Petitioner's burden of proof (*see* Section VII *infra*), the undersigned finds that the Student's misconduct and discipline during SY 2012-2013 were not attributable to the lack of an IEP.

153. Although the Student received failing grades in subjects other than Algebra I at times during SY 2012-2013, he passed all of those courses. The undersigned therefore finds that any academic deficit in non-math courses that the Student may have suffered during SY 2012-2013 due to the lack of specialized instruction and related services was *de minimis*.

154. On June 12, 2013, Petitioner again authorized Special Education Specialist to be her representative regarding the Student. R-30-3 through -5.

155. On June 13, 2013, Neurologist wrote a document stating, *inter alia*, that she had prescribed medication for the Student's partial complex seizures and a stimulant medication to improve his attention and focus, both of which were having positive effects. P-2-1.

156. Neurologist's June 13, 2013 document stated that the Student's ADHD caused impulse control problems and that she understood he had been "suspended for his behavior at school at least 6 times within a couple of months." *Id.*<sup>15</sup>

157. Neurologist's June 13, 2013 document attributed almost all of the Student's bad behavior to "lack of control of impulses, for which he could be counseled." P-2-2.

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<sup>15</sup> The information provided to Neurologist was incorrect. *See*, Finding of Fact 117 and footnote 10, *supra*.

158. Neurologist's June 13, 2013 document attributed the Student's poor grades to his being punished inappropriately and not receiving encouragement or academic support. *Id.*

159. Neurologist's June 13, 2013 document stated that the Student had Learning Disabilities. P-2-1.

160. Neurologist's June 13, 2013 document recommended that the Student be placed in a small, structured class with greater one-on-one teacher involvement and that the Student receive behavior modification counseling and academic reinforcement, particularly in math skills, perceptual reasoning, and organization and planning skills. P-2-2.

161. The record is devoid of documentary evidence of whether Neurologist's June 13, 2013 document was provided to Respondent prior to the filing of the DPC herein. Petitioner testified that she provided this document to Respondent, initially stating that she did not know when and later testifying that it was a week after the letter was issued. For the reasons explained in Section VIII *infra*, the undersigned does not credit Petitioner's testimony, and the undersigned finds that Neurologist's June 13, 2013 document was not provided to Respondent prior to the filing of the instant DPC.

162. On June 17, 2013, Special Education Specialist emailed School Director requesting a meeting to "revise the Student's IEP as appropriate." R-30-1 and -2.

163. On June 18, 2013, Respondent's counsel emailed Special Education Specialist asking her to confirm that Petitioner no longer was working with [redacted] to which Special Education Specialist replied later on June 18, 2013, that Petitioner was not working with [redacted] "for this meeting." R-30-1.

164. On July 15, 2013, the Student's MDT met and reviewed the Student's evaluations, discussed the Student's academic and behavioral needs, determined the Student to be eligible for special education services as a student with OHI, and agreed to meet again to "finalize" the Student's IEP. P-37-2, R-31-1.

165. At the July 15, 2013 MDT meeting, Petitioner was requested to schedule a meeting with School Director regarding which math class the Student would attend. R-31-1.

166. On July 19, 2013, Special Education Specialist emailed SEC stating, *inter alia*, that Petitioner wanted the Student's IEP to include small group instruction, an hour a week of counseling services, and support in the areas of organization and "self regulation of impulses." R-32-3.

167. Respondent authorized eight hours per week of tutoring for the Student, from July 29, 2013 through August 31, 2013, for a total of 40 hours; however, Petitioner failed to schedule sessions timely, cancelled some sessions, and stated that the Student was unavailable certain dates, resulting in his receiving only 10.5 hours of tutoring.<sup>16</sup> R-46-1.

168. On July 30, 2013, SEC emailed Special Education Specialist (R-32-2) attaching a draft IEP (R-36-1).<sup>17</sup>

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<sup>16</sup> Petitioner testified that the tutor did not return her telephone calls and was unavailable until the last two weeks of the summer. Testimony of Petitioner. However, for the reasons explained in Section VIII *infra*, the undersigned does not credit Petitioner's testimony.

<sup>17</sup> The draft IEP is dated "08/15/2014," a typographical error.

169. Later on July 30, 2013, Special Education Specialist emailed SEC expressing concern that the IEP contained no goals in the area of math and requesting that appropriate supports in math, such as a small group setting, be included in the IEP. R-32-1.

170. Later on July 30, 2013, SEC emailed Special Education Specialist stating, *inter alia*, that the “social emotional goals cover your concerns in math” and that at the upcoming IEP Team meeting, the small group setting could be discussed and agreed to. R-32-1.

171. The IEP Team met on August 6, 2013, and formalized the Student’s eligibility determination. R-34, R-35-1.

172. The IEP Team met on August 12, 2013, to review the draft IEP. P-38-1, R-37-1.

173. Petitioner was not in attendance at the August 12, 2013 meeting, and did not answer the telephone when called by School Director and Special Education Specialist. P-38-1, R-37-1.

174. At the August 12, 2013 meeting, Special Education Specialist requested math goals in the IEP, to which Respondent’s representative(s) replied that until the Student took the “Diagnosis test” the first week of school, goals would not be included because Respondent needed a Present Level of Performance (“PLOP”) to proceed in this area, which also would require amending the eligibility determination to include math as an “area of concern.” P-38-1 and -2, R-37-1.

175. The only reason expressed by Special Education Specialist for goals in math was that the Student had failed Algebra I in the past year. Testimony of Special Education Specialist.

176. Based upon the entire record, the undersigned finds that establishing math goals without knowing what math course the Student would take would not have been appropriate, and that Respondent's approach to the issue of math goals, *i.e.*, to await the results of the diagnostic testing and then determine what math goals, if any, the Student needed, was reasonably calculated to confer educational benefit on the Student.

177. At the August 12, 2013 meeting, Special Education Specialist expressed Petitioner's disapproval of the Student beginning SY 2013-2014 with an IEP that lacked goals in math and related specialized instruction. P-38-2, R-38, testimony of SEC.

178. Respondent's representatives did not agree because although the Student had failed Algebra I because of his failure to turn in homework, he had no academic deficits in math. Testimony of SEC.

179. Special Education Specialist did not raise any concerns about academic goals in areas other than math prior to or at the August 12, 2013 meeting.<sup>18</sup>

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<sup>18</sup> Special Education Specialist testified that at the August 12, 2013 meeting, she stated that the Student's IEP required goals in History and Physics. Testimony of Special Education Specialist. However, Special Education Specialist's notes of this meeting (P-38) do not mention goals in academic areas other than math and SEC testified that Special Education Specialist did not request academic goals other than in math. Testimony of Special Education Specialist. For the reasons explained in Section VIII *infra*, the undersigned credits the testimony of SEC over that of Special Education Specialist.

180. At the August 12, 2013 meeting, Special Education Specialist requested an increase in the hours of specialized instruction and Respondent's representatives agreed.<sup>19</sup>

181. Based upon the entire record, the undersigned finds that, at the August 12, 2013 IEP Team meeting, Respondent's representatives and Special Education Specialist agreed to the Student's hours of specialized instruction, and that the hours agreed to were reasonably calculated to confer educational benefit on the Student.

182. On August 12, 2013, after the meeting, and again on August 14, 2013, the revised draft IEP was emailed to Special Education Specialist for her comments. R-40-2 and -3.

183. On August 18, 2013, Respondent's counsel again emailed Special Education Specialist, attaching the "finalized" IEP and asking if she had any questions or concerns "beyond what we already have discussed," and asking if she and Petitioner were available on October 1, 2013, for a meeting to review the Student's progress. R-41-1.

184. On September 4, 2013, Respondent's counsel again emailed Special Education Specialist, stating that she had not received a response to the August 18, 2013 email, requesting Petitioner's signature on the IEP, and asking again about the proposed October 1, 2013 meeting date. *Id.*

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<sup>19</sup> Special Education Specialist's notes of the August 12, 2013 meeting (R-38) state that she had requested more hours of specialized instruction and related services than Respondent determined to provide; however, Respondent's counsel's recollection of the meeting (R-40-1), which was corroborated by SEC (Testimony of SEC) was that the Special Education Specialist had agreed to the increased hours that Respondent offered and only remained in disagreement about the absence of math goals. For the reasons explained in Section VIII *infra*, the undersigned credits the testimony of SEC and Respondent's counsel's documentation over the testimony of Special Education Specialist.

185. Later on September 4, 2013, Special Education Specialist emailed Respondent's counsel advising her that all future inquiries should be made to Roberta Gambale [Petitioner's new, and current, counsel in this case]. *Id.*

186. Later on September 4, 2013, Petitioner's counsel emailed Respondent's counsel stating that Petitioner was not in agreement with the IEP but would authorize its implementation. R-42-3.

187. On September 4, 2013, Neurologist wrote a document stating her recommendations for the Student, including placement in a small structured class with structure carried into recess time; the use of behavior modification techniques rewarding achievement of preset goals and good behavior; academic intervention to help with his difficulties in math; occupational therapy to help with handwriting; and behavior support services to control defiant behavior and help the Student with anger management. P-1-1.

188. On September 5, 2013, Respondent's counsel emailed the IEP to Petitioner and Petitioner's counsel and asked their availability for the October 1, 2013 meeting. R-42-3.

189. On some date shortly after September 5, 2013, the Student's IEP was implemented effective as of August 12, 2013, without goals in math or any other academic area. R-39.

190. The Student's August 12, 2013 IEP provides for 2.5 hours per week of specialized instruction in the general education setting, 2.25 hours per week of specialized instruction in the outside general education setting, and 45 minutes per week of behavioral support services in the outside general education setting. R-39-4.

191. The instant DPC was filed on September 6, 2013.<sup>20</sup> HO-1.

Events Subsequent to September 11, 2013.

192. At some time during the first few weeks of SY 2013-2014, Respondent administered diagnostic testing of students to place them in math classes, and placed the Student in Algebra I, the same math class he had in SY 2012-2013. Testimony of Petitioner, testimony of School Director.

193. From the beginning of SY 2013-2014 through October 10, 2013, the Student had nine disciplinary “referrals”—five for tardiness, one for class disruption by repeated calling out despite warning, one for class disruption by using combative language, one for losing classroom materials, and one for unspecified disruptive behaviors. R-49.

194. On October 11, 2013, a month after filing the DPC in the instant case, Petitioner’s counsel emailed Respondent’s counsel proposed academic goals for English and History. R-44-1.

195. As of October 24, 2013, the Student was doing well on exams in his math class, *i.e.* Algebra I, which has six students. Testimony of Math Teacher #2. He has a B average on exams but has completed only 75 percent of the assigned math homework, reducing his overall grade to a C. *Id.* He is working on turning in the overdue homework. *Id.*

196. As of October 24, 2013, the Student was completing his homework in subjects other than math, with the exception of one physics homework assignment. Testimony of SEC.

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<sup>20</sup> The DPC was corrected on September 11, 2013. HO-6.

197. As of October 24, 2013, the Student has difficulty staying in his seat, and needs frequent redirection, *e.g.* “pointed directions” to take out his CJ, to take out his homework, to correct his homework, and to take notes. Testimony of Math Teacher #2.

198. Special Education Teacher works with the Student both in “pull out” sessions (*i.e.*, outside the general education setting) during his martial arts class and enrichment periods, and “push in” sessions (*i.e.* in the general education setting) during his Algebra I class. Testimony of Special Education Teacher.

199. During “pull out” sessions, Special Education Teacher works with the Student on the Student’s organizational skills. Testimony of Special Education Teacher.

200. During “push in” sessions, Special Education Teacher works with the Student to ensure he understands and follows directions and that he has recorded all of his assignments. Testimony of Special Education Teacher.

201. The Student is benefiting from the specialized instruction; in particular, his organization skills are improving, although he still needs to be “constantly” reminded of his assignments. Testimony of Special Education Teacher.

202. The Student has taken an interest in his grades and tells SEC when he receives good grades. Testimony of SEC.

203. The Student does not require additional specialized education or related services. *Id.*<sup>21</sup>

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<sup>21</sup> Petitioner introduced no evidence that the Student currently requires additional specialized instruction or related services.

Petitioner's Compensatory Education Plan

204. Special Education Specialist testified that the Student failed math in SY 2012-2013 and struggled in other subjects because he had not received the specialized instruction and related services that he should have received if he had not been exited from special education. Testimony of Special Education Specialist.

205. Special Education Specialist did not testify to the Student's academic achievement levels, before or after the alleged denial of FAPE, or to the progress he would have made if Respondent had provided him with specialized instruction and related services during SY 2012-2013, or to any specific academic deficits, other than failing math, that the Student allegedly suffered.

206. The record is devoid of any other documentary or testimonial evidence of any specific academic deficits other than failing math suffered by the Student during SY 2012-2013.

207. Special Education Specialist testified that the Student should receive 100 hours of tutoring in unspecified academic subjects because that is the maximum amount of tutoring that he could receive during times when he could be receptive to tutoring, which she identified as two to four hours on the weekend for the remainder of SY 2013-2014. Testimony of Special Education Specialist.

208. Special Education Specialist provided no description of the content of the tutoring or how it would put the Student in the position he would have occupied if Respondent had provided him with specialized instruction and related services during SY 2012-2013.

209. The record is devoid of evidence of how tutoring would remediate the Student's failing of his math course (Algebra I) due to the lack of an IEP during SY 2012-2013.

210. Special Education Specialist testified that the Student should attend a therapeutic summer camp because that would help him with issues he experienced in interactions with his peers. Testimony of Special Education Specialist.

211. The record is devoid of evidence of any peer-interaction issues suffered by the Student due to the lack of an IEP during SY 2012-2013 or how therapeutic summer camp would remediate any social-emotional problems the Student may have.

## **VII. BURDEN OF PROOF**

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

## **VIII. CREDIBILITY**

Petitioner's two witnesses were not credible, as discussed in detail *infra*.

Petitioner was not credible. On direct examination she made good eye contact with her counsel and with the undersigned, and her tone of voice was level. On cross examination and examination by the undersigned, her tone of voice became agitated and she failed to make eye contact. On cross examination, Petitioner testified that she did

not recall when she had provided Neurologist's letters to Respondent. On redirect, she conveniently recalled and testified that she provided the letters to Respondent "a week after they were written." When the undersigned asked Petitioner how she responded to the Student's misconduct at home, she initially described several forms of negative reinforcement. When the undersigned then asked whether Petitioner therefore agreed that negative reinforcement was appropriate for the Student and asked follow up questions regarding her response to other forms of misconduct at home, Petitioner admitted no negative reinforcement, testifying that she responded to the Student's misconduct by reasoning with him or ignoring the misconduct. Petitioner also conveniently remembered dates of meetings that supported her case and just as conveniently forgot the dates of meetings that did not. The undersigned found particularly incredible Petitioner's testimony that she repeatedly asked School Director in meetings to reinstate the Student's IEP and that instead of responding, School Director simply ignored her. This is not credible. When asked on cross examination why she did not follow up on her alleged requests to reinstate the Student's IEP, Petitioner testified, "I was tired ... I was just ignored ... I just gave up." Given Petitioner's history of having previously filed a DPC to enforce her IDEA rights and her many emails to Respondent's staff and to Special Education Specialist, this defeatist testimony was not credible. When Petitioner took the stand to provide rebuttal testimony, the undersigned questioned her about her April 5, 2013 email to Special Education Specialist in which she stated that the school had told her that if she wanted to reinstate the Student's IEP in the future she should let them know (P-22-3), asking Petitioner who at the school had told her that. Petitioner responded by pointing to Respondent's counsel, even though there is no record evidence that

Petitioner had met, spoken with, or exchanged correspondence with Respondent's counsel. When the undersigned challenged Petitioner on this point, she testified that "evidently it wasn't her" and that she did not recall who at the school had told her she could ask to have the Student's IEP reinstated, or when. After her rebuttal testimony, Petitioner put her head down on her folded arms on the hearing room table and avoided eye contact with the undersigned. The undersigned cannot determine whether Petitioner knowingly prevaricated, or she has an extraordinarily selective memory. Regardless, whenever Petitioner's testimony conflicted with documentary evidence or the testimony of credible witnesses, the undersigned has credited the latter.

Special Education Specialist was not credible. Despite her meticulous documentation of various meetings in the form of typed notes and confirming emails, she testified that she had other meetings with School Director—in which she and/or Petitioner asked that the Student's IEP be reinstated—at which she took no notes and about which she sent no confirming emails to School Director or anyone else. This is not credible. Special Education Specialist also testified that at the August 12, 2013 IEP Team meeting, she expressed the need for the Student's IEP to include academic goals in English and History, even though her notes of the meeting (and subsequent emails with comments on the Student's draft IEP) mentioned academic goals only in math. Her own emails discredit her testimony. In addition, despite Special Education Specialist's thick file of email exchanges with Petitioner and with Respondent's representatives, she testified that there were other documents (including a letter or email to School Director early in 2013 requesting reinstatement of the Student's IEP) that were not produced. This is not credible. On examination by the undersigned, she admitted that she provided all of

her documentation to Petitioner's counsel and it was unlikely any document supportive of Petitioner's position would have been excluded from Petitioner's disclosure. On cross examination and on examination by the undersigned, Special Education Specialist repeatedly qualified her responses with phrases such as "not specifically" or "not explicitly" to evade giving responses that would be harmful to Petitioner's case. For example, when asked by Respondent's counsel whether any of Special Education Specialist's emails prior to May 13, 2013 stated that Petitioner wanted the Student's IEP reinstated, Special Education Specialist responded, "no, not specifically the words 'IEP,' but I do refer to 'appropriate supports.'" The undersigned instructed Special Education Specialist repeatedly to answer the question asked, which she resisted doing, and her tone became argumentative. Based upon all of the documentary evidence, and the testimony of Respondent's witnesses, Special Education Specialist had failed to notify Respondent in a timely manner that Petitioner wanted the Student's IEP reinstated, and had failed to raise concerns about academic goals in subjects other than math at the August 2013 IEP Team meeting. The undersigned concludes that Special Education Specialist attempted through her false testimony to cover for these failures to advocate for Petitioner. Accordingly, the undersigned has given the testimony of Special Education Specialist no weight whatsoever.

Respondent's witnesses were credible, to the extent of their firsthand knowledge or professional expertise. Although School Director changed her testimony regarding whether Petitioner had been advised that specialized instruction would not be provided under a "Section 504" plan, this one discrepancy did not undercut her credibility, as she testified candidly and admitted to facts that supported Petitioner's case (*e.g.*, that the IEP

Team did not consider any evaluations of the Student in recommending that his IEP be converted to a “Section 504” plan).

## **IX. CONCLUSIONS OF LAW**

### Purpose of the IDEA

1. The IDEA is intended “(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C. §1400(d)(1). *Accord*, DCMR §5-E3000.1.

### FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

### Initial Evaluation and Eligibility Determination

3. When the Student enrolled in Respondent for SY 2012-2013, the Student had been determined eligible for special education at his previous LEA. However, he did not transfer *within the same academic year*, as addressed in 20 U.S.C. §1414(d)(2)(C) and 34 C.F.R. §300.323(e) and (f).

4. Therefore, it was incumbent upon Respondent to conduct an initial evaluation of the Student's eligibility utilizing procedures to determine if he was a child with a disability and to determine his educational needs. 34 C.F.R. §300.301(c)(2).

5. In conducting the evaluation, the LEA must

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under §300.8; and

(ii) The content of the child's IEP ...;

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §300.304(b).

6. Once a child has been evaluated,

a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (c) of this section and the educational needs of the child ....

34 C.F.R. §300.306(a)(1).

7. Respondent violated 34 C.F.R. §§300.304(b) and 306(a)(1) because the IEP Team that met on October 9, 2012 failed to use any assessment tools, much less a variety of assessment tools, before determining that the Student was not a child with a disability under 34 C.F.R. §300.8. Findings of Fact 56 and 57.

Reevaluation Before Change in Eligibility<sup>22</sup>

8. Subject to exceptions not applicable to the Student, an LEA must reevaluate a child in accordance with 20 U.S.C. §1414 before determining that he no longer is a child with a disability. 20 U.S.C. §1414(c)(5)(a), 42 C.F.R. 300.305(e), DCMR §5-E3005.7.

9. As part of a reevaluation, the IEP Team and other qualified professionals, as appropriate, are required to:

- (A) review existing evaluation data on the child, including—
  - (i) evaluations and information provided by the parents of the child;
  - (ii) current classroom-based, local, or State assessments, and classroom-based observation; and
- (B) on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine—
  - (i) whether the child is a child with a disability ..., and the educational needs of the child, or, in the case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;
  - (ii) the present levels of academic achievement and related developmental needs of the child;
  - (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

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<sup>22</sup> Although *Respondent* had not yet evaluated the Student, the IEP Team that met on August 12, 2013 proceeded as though the Student were eligible based upon the prior LEA’s evaluation, then persuaded Petitioner to “transition” the Student from an IEP to a “Section 504” plan, then notified Petitioner that the Student was found not to be eligible. Findings of Fact 56 and 57. Taken together, these actions by Respondent were tantamount to reevaluating the Student and finding him ineligible.

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

20 U.S.C. §1414(c)(1); *accord*, 34 C.F.R. §300.305. District of Columbia regulations paraphrase these federal provisions, while adding to the role of the IEP team determining whether the child has “a particular category of disability.” DCMR §5-E3005.4(b)(1).

10. The IEP Team and other qualified professionals, as appropriate, may determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child’s educational needs. 20 U.S.C. §1414(c)(4); 34 C.F.R. §300.305(d). In that case, the LEA must notify the child’s parents of that determination and the reasons for the determination, and of the parents’ right to request an assessment to determine whether the child continues to be a child with a disability and to determine the child’s educational needs. 20 U.S.C. §1414(c)(4); 34 C.F.R. §300.305(d). District of Columbia regulations implementing these provisions of IDEA omit the references to determining the child’s educational needs. DCMR §5-E3005.6.

11. The undersigned concludes that Respondent violated 20 U.S.C. §1414(c)(5)(a) and DCMR §5-E3005.7 because Respondent determined the Student to be no longer eligible for special education without reviewing existing evaluation data on the Student, without identifying what additional data were needed, without notifying Petitioner that Respondent had determined that no additional data were needed to determine whether the

Student continued to be a child with a disability, and without advising Petitioner of her right to request an assessment.<sup>23</sup> Findings of Fact 57 and 58.

### IEP

12. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP as follows:

(i) In general. The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

\* \* \*

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) 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

(bb) meet each of the child’s other educational needs that result from the child’s disability;

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<sup>23</sup> Because the statutory and regulatory provisions cited in Conclusions of Law 8 through 11 *supra* are unambiguous, no discussion of the cases cited by Petitioner’s counsel in her oral closing argument is necessary to reach the conclusion that Respondent exited the Student from special education without evaluating or reevaluating whether he was or remained a child with a disability.

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and 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;

(IV) 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 for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) 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 subclause (IV)(cc);

(VI)

(aa) 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 1412 (a)(16)(A) of this title; and

\* \* \*

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications....

20 U.S.C. §1414(d)(1)(A).

13. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982)(“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

*Rowley*, 458 U.S. at 201.

14. The LEA “has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE.” *Schoenbach v. District of Columbia*, 36 IDELR 67, 106 LRP 46342 (D.D.C. 2006). IEP decisions are not made by majority vote. Rather, “[i]f the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.” *Id.*, citing 34 C.F.R. Part 300, Appendix A -- Notice of Interpretations, 64 Fed. Reg. 12,473 (1999).

### Compensatory Education

15. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401

F.3d 516, 521-24 (D.C. Cir. 2005) (“*Reid*”). That relief may include a compensatory award of prospective services:

When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.

*Id.*

16. In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005). Educational programs, including compensatory education, must be qualitative, fact-intensive, and “above all tailored to the unique needs of the disabled student.” *Id.*

17. Mechanical calculation of the number of hours of compensatory education (a “cookie-cutter approach”) is not permissible. *Reid*. Rather, compensatory awards “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” *Id.* Awards compensating past violations must “rely on individual assessments.” *Id.*

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

*Id.* However, formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an “individually-tailored assessment.” *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (citing *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (internal quotation marks omitted).

18. The hearing officer must base a compensatory education award on evidence regarding the student's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.*

19. Equity sometimes requires "consideration of the parties' conduct, such as when the school system reasonably 'require[s] some time to respond to a complex problem," ... or when parents' refusal to accept special education delays the child's receipt of appropriate services.... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.*

20. A student who was denied a FAPE may not be entitled to an award of compensatory education either because the student has "flourished in his current placement" (*Thomas v. District of Columbia*, 407 F. Supp. 2d 102, 115 (D.D.C. 2005)); because "the services requested, for whatever reason, would not compensate the student for the denial of a FAPE" (*Gill v. District of Columbia*, 751 F. Supp. 3d 104, 44 IDELR 191 (D.D.C. 2010) ("*Gill*")), or because the student's "FAPE denial had been fully remedied" prior to the filing of the DPC (*Wheaton v. District of Columbia*, 55 IDELR 12, 110 LRP 44500 (D.D.C. 2010)).

21. In the instant case, the undersigned advised Petitioner's counsel at the PHC, and in the PHO (HO-10-6), that Petitioner must introduce evidence supporting Petitioner's Compensatory Education Plan, including evidence of specific educational deficits resulting from the Student's alleged loss of FAPE and the specific compensatory measures needed to best correct those deficits, *i.e.*, to elevate the Student to the

approximate position he would have enjoyed had he not suffered the alleged denial of FAPE. Petitioner's counsel failed to follow this instruction. Special Education Specialist presented no testimony as to the Student's specific educational deficits other than stating that he had failed Algebra I during SY 2012-2013. Special Education Specialist testified that she recommended 100 hours of tutoring in unspecified subjects because she thought that was the maximum number of hours the Student could absorb, without identifying how that would rectify his having failed Algebra I. Special Education Specialist also testified that the Student's social/behavioral problems could be ameliorated by a therapeutic summer camp, but she did not identify any social/behavioral deficits that resulted from the Student's alleged loss of FAPE, nor did she identify any specific compensatory measures that a therapeutic summer camp would apply to correct those deficits.

22. At the same time, Petitioner's failure to justify a specific award does not waive the student's right to compensatory education. *Gill; see also, Henry v. District of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010).

23. As discussed *supra*, the Student's lack of an IEP providing specialized instruction and related services during SY 2012-2013 school year prevented him from accessing the math curriculum, specifically by frustrating his ability to complete his math homework, resulting in him failing Algebra I. Finding of Fact 151. Had he earned a passing grade in math in SY 2012-2013, he would not be repeating the same math course in SY 2013-2014.

24. Even though the Student still may be ahead of his District-wide grade-level peers in the math curriculum, he is a year behind where *he* would have been in math but

for the denial of FAPE. In the absence of compensatory education, the Student will take one fewer advanced math class in high school than if he had passed Algebra I in SY 2012-2013. Accordingly, the undersigned concludes that the appropriate compensatory education is the opportunity for the Student to take an additional math class during the summer of 2014.<sup>24</sup> An additional math class, with appropriate specialized instruction, will restore the Student to the position he would have occupied but for the denial of FAPE.

### Summary

25. Respondent denied the Student a FAPE by exiting the Student from specialized instruction and related services at a meeting held on or about October 9, 2012 because Respondent did not review any evaluations of the Student and did not have any basis for determining that the Student no longer qualified for special education.

26. Petitioner's agreement to exit the Student from special education and replace his IEP with a "Section 504" Plan was not fully informed and does not constitute a waiver of her rights under IDEA.

27. Respondent did not deny the Student a FAPE by failing to reinstate his IEP prior to August 12, 2013, pursuant to Petitioner's requests made between October 9, 2012

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<sup>24</sup> School Director testified that Respondent's summer school is "enrichment," *i.e.*, not core classes such as math, and that Respondent does not have or fund a credit recovery program. Regardless, it is Respondent's obligation to rectify the harm that Respondent caused by exiting the Student from special education without having properly determined him to be ineligible based on evaluations, even if that means paying another institution to provide the course to the Student.

and August 6, 2013 because no request was made until May 2013, and that request was timely acted upon by Respondent.<sup>25</sup>

28. Respondent did not deny the Student a FAPE by failing to include academic goals including goals in the area of mathematics in the Student's IEP developed on or about August 6, 2013 because academic goals in math, if any were required, could not be determined prior to diagnostic testing to establish which math class the Student would take, and Special Education Specialist, as Petitioner's representative, did not raise a concern about goals in other academic areas.

29. Respondent did not deny the Student a FAPE in SY 2013-2014 to date by failing to provide the Student with sufficient specialized instruction outside general education to address his disabilities and allow him to access the general education curriculum because the hours provided were agreed to by Special Education Specialist as Petitioner's representative, and those hours were reasonably calculated to confer educational benefit on the Student.

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<sup>25</sup> Because the Student should have had an IEP in place throughout SY 2012-2013, Petitioner's failure to request its "reinstatement" has no impact on the relief awarded.

## **X. ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. Respondent shall provide or fund the following services as compensatory education for the denial of FAPE to the Student: During the summer of 2014, the Student shall be provided the math course that the Student otherwise would take in SY 2014-2015 based upon Respondent's curriculum and the Student's performance in Algebra I during SY 2013-2014. This course may be provided in person (*e.g.* in a classroom or office) or via computer.

2. If the course described in Paragraph 1 is provided in person,

(a) Respondent shall provide at least four hours of specialized instruction per week, which may be in the general education setting or in the outside general education setting, or a combination;

(b) if the location is more than a half mile walk from the Student's home, Respondent shall provide transportation or pay the cost of public transit; and

(c) if the Student incurs more than three unexcused absences or more than five incidents of unexcused tardiness, Respondent's responsibility to provide the course shall cease.

3. If the course described in Paragraph 1 is provided via computer,

(a) at least four hours per week of specialized instruction support must be available to the Student in person, online, or by telephone;

(b) unless the Student has an appropriate computer and Internet connection at his home and his Parent chooses for him to take the course from home,

Respondent shall provide a location with an appropriate computer and Internet connection for the Student to take the course and if the location is more than a half mile walk from the Student's home, Respondent shall provide transportation or pay the cost of public transit; and

(c) if in any two-week period the Student fails to participate in the computer-based course for at least 20 hours, Respondent's responsibility to provide the course shall cease.

4. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

5. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

6. Petitioner's other requests for relief are DENIED.

Dated this 29<sup>th</sup> day of October, 2013.



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Charles Carron  
Impartial Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).