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

[Student] and [Parent],

Petitioners,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: February 19, 2013

Hearing Officer: Jim Mortenson

Case No: 2012-0821

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Student Hearing Office (SHO) on December 12, 2012 and with the Respondent on December 13, 2012. A prehearing notice and order was issued on December 14, 2012, with specific instructions for both parties. A prehearing conference was held, via telephone, on January 4, 2013, and a prehearing order was issued on that date. Included in the prehearing order, among other things, was an order that the Petitioners' claims arising prior to December 13, 2010, would not be considered because they had not explained how the Student's Mother was prevented from filing a timely complaint, assuming the allegations of not being provided required information were true. Due to several other procedural matters and discussions between the parties, a second prehearing conference was scheduled for January 16, 2013.

The second prehearing was held on January 16, 2013, and the parties advised the Undersigned that they had agreed to attempt mediation. The 45 day hearing timeline, thus, began on January 13, 2013. The Respondent challenged the authority of the Independent Hearing Officer (IHO) to change the Student's educational placement while he is incarcerated and it was noted that the authority of the IHO does not supersede any determinations made by a Court in the Student's case. A dispute over records had been on-going and the Respondent had been ordered to provide the Petitioners a complete set of all of the records it had on the Student, regardless of their original form, no later than Friday, January 11, 2013. The dispute remained as of January 16, 2013, and the parties were encouraged to work together to determine what the Student's educational records were. The Respondent filed an untimely response to the Complaint on January 10, 2013, and, due to the late response, and the lack of additional records provided timely to the Petitioner, it was ordered that the Respondent would carry the burden of production at the due process hearing and would present its case first. It was also ordered, among other things, that prehearing motions, including motions to permit telephone testimony, would be handled in accordance with SHO Standard Operating Procedure (SOP) § 401.

Disclosures for hearing were exchanged on January 29, 2013. The Respondent filed a motion for the IHO to reconsider the ruling on the presentation of cases. The Petitioners filed a motion in limine and a motion to reconsider the ruling on timeliness of certain issues in the complaint (those more than two years old). The Petitioners' motion in limine was withdrawn, on the record, at the hearing. The Respondent's motion was denied, on the record, at the hearing because the direction to have the Respondent to proceed first was to ensure fairness at hearing where the Respondent failed to provide a timely response to the complaint and failed to timely provide the Petitioners access to the Student's education records. The Petitioners' motion to reconsider the

ruling on claims excluded was deferred until the completion of the hearing, following discussion of the matter at the start of the hearing. It is noted here that the motion to reconsider is hereby denied as no further explanation for why the Student's Mother was prevented from filing timely complaints was provided.[1] The Petitioners' argument that the allegation that the Respondent withheld information from the parent that was required under IDEA should be enough to invoke the exception to the two-year limitation for filing a complaint was not persuasive because causation was lacking. *See* 34 C.F.R. § 300.511(e) & (f). The analysis used by the Third Circuit Court of Appeals is logical and useful. The Third Circuit, in *D.K. v. Abington School Dist.*, 696 F.3d 233 (3rd Cir. 2012) stated:

> Establishing evidence of specific misrepresentations or withholding of information is insufficient to invoke the exceptions [to the two year limitations period]; a plaintiff must also show that the misrepresentations or withholding *caused* her failure to request a hearing or file a complaint on time. The terms "prevented from" and "due to" denote a causation requirement. Thus, where the evidence shows, for example, that parents were already fully aware of their procedural options, they cannot excuse a late filing by ***247** pointing to the school's failure to formally notify them of those safeguards.

Id. at 246-247. In this case the Petitioner was directed, on December 14, 2012, "to provide a written explanation of how the alleged failures to provide the specified records prevented them from filing a timely complaint" by December 31, 2012. The timing of this requirement was designed to permit the Respondent to review the proffer prior to the prehearing. The Petitioner never made the proffer. The purpose of the proffer was not to prove the exception to the limitations period applied, but to enable the parties to appropriately prepare for hearing, including an opportunity for the Respondent to challenge the Petitioner's explanation. The parties' positions necessarily had to be worked out in the prehearing process, and issues to be heard identified, so that adequate time for the hearing could be scheduled (this is important because the HOD must be issued within 45 days of the start of the hearing timeline) as well as ensure a fair hearing. Since the Petitioner did not provide the explanation of causation, and never

[1] The Student's Mother failed to show at the hearing to testify.

did provide evidence at the hearing of causation, the motion to reconsider the prehearing ruling on the limitation of claims must be denied.

The hearing was convened at 9:30 a.m. on February 5, 2013, in a conference room at the District of Columbia Correctional Treatment Facility, 1901 E Street SE, Washington, D.C. The hearing was closed to the public. The Petitioners were represented by Joseph Tulman, Esq., Lisa Geis, Esq., and student attorneys Bethany Shechtel and Arturo Bohorquez. The Respondent was represented by Maya Washington, Esq. The hearing recessed approximately 1:20 p.m. and resumed at 9:25 a.m. on February 7, 2013, in an office at the District of Columbia Correctional Detention Facility, 1901 D Street SE, Washington, D.C., and concluded by 3:45 p.m.

On the second day of hearing the Petitioners moved to permit one of their witnesses to testify via telephone. The Petitioners had been informed on December 14, 2012, that:

> Due to frequent practical problems with telephone testimony, including, inter alia, device functionality and clarity on either end, witness access to documents in evidence, and determining witness credibility, telephone testimony will not be permitted without permission. Permission must be obtained through written motion including evidence of good cause to permit telephone testimony.

The prehearing order issued January 16, 2013, directed the parties that motions to permit telephone testimony would be handled pursuant to SOP § 401. The SOP required the motion to be filed no later than five business days prior to the start of the hearing. When the motion was made at hearing, the Undersigned considered whether there was a reason for exception to the five day rule. The Petitioners advised the late motion was due to attorney mistake, without further explanation. Given the lack of good cause for a late motion for telephone testimony (such as an unforeseen emergency on the part of the witness that prevented her from being present to testify), the motion was denied.

The due date for this HOD is February 26, 2013. This HOD is issued on February 19, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

> Whether the Respondent denied the Student a free appropriate public education (FAPE) because it failed to provide the Student with special education and related services in conformity with his IEP since December 2010?

The substantive requested relief at the time of hearing was:

(1) Implementation of the Student's IEP; and

(2) Placement at Youth in Transitions residential facility in Baltimore, MD, or, alternatively, a non-residential program that includes wrap-around services such as multisystemic therapy as a related service.

The Respondent failed to provide the Student with special education and related services in conformity with his IEP for over ten months while he was incarcerated at two different times in the District of Columbia since December 2010. As a result, the Student is entitled to compensatory education, as described herein, and his IEP is to be implemented as written until changed by his IEP team.

IV. EVIDENCE

Five witnesses testified at the hearing, three for the Respondent and two for the Petitioners. The Respondent's witnesses were:

1) [redacted] School Social Worker (K.C.)

2) [redacted] Special Education Teacher (G.W.)

3) [redacted], Principal (S.L.)

The Petitioners' witnesses were:

1) Student, (S)

2) [redacted] Executive Director of Adult Programs, National Center on Institutions and Alternatives (R.N.)

G.W., S.L., S, and R.N. testified credibly. S did not always have clear answers to questions, however. K.C. gave some testimony that was in contradiction to the Respondent's arguments and evidence in the documentary record, and so her testimony is largely suspect, although not entirely discounted where supported by additional evidence.

All of the Respondent's 24 disclosures were admitted into evidence as exhibits. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	May 1, 2012	Prior Written Notice – Identification
R 2	May 1, 2012	Evaluation Summary Report
R 3	May 1, 2012	Final Eligibility Determination Report
R 4	April 23, 2012	IEP
R 5	April 23, 2012	Disability Worksheet: Specific Learning Disability
R 6	April 23, 2012	Meeting Notes
R 7	April 23, 2012	Reevaluation of Eligibility for Special Education Services
R 8	February 26, 2012	Speech/Language Evaluation Report
R 9	February 13, 2012	Letter of Invitation
R 10	January 4, 2012	Score Report
R 11	January 12, 2012	Confidential Psychological (Re-) Evaluation (See P 5)
R 12	January 10, 2012	Social Work Assessment Report (See P 5)
R 13	December 9, 2011	Receipt
R 14	December 12, 2011	Transfer of Rights Letter
R 15	December 9, 2011	Analysis of Existing Data
R 16	Undated	Assessment Booklet
	Undated	Admission/Withdraw Maintenance
	February 7, 2012	Transcript, Letter of Understanding
R 17	January 24, 203	Assignment Summary – Current

Ex. No.	Date	Document (cont.)
R 18	November 19, 2011	Event Sign-in
	November 30, 3011	Even Sign-in
	December 1, 2011	Event Sign-in
	December 5, 2011	Event Sign-in
	December 6, 2011	Event Sign-in
	December 7, 2011	Event Sign-in
	December 8, 2011	Event Sign-in
	December 9, 2011	Event Sign-in
	December 12, 2011	Event Sign-in
	December 13, 2011	Event Sign-in
	December 14, 2011	Event Sign-in
	December 15, 2011	Event Sign-in
	December 16, 2011	Event Sign-in
	December 19, 2011	Event Sign-in
	December 20, 2011	Event Sign-in
	December 21, 2011	Event Sign-in
	January 3, 2012	Event Sign-in
	January 4, 2012	Event Sign-in
	January 5, 2012	Event Sign-in
	January 6, 2012	Event Sign-in
	January 9, 2012	Event Sign-in
	January 10, 2012	Event Sign-in
	January 12, 2012	Event Sign-in
R 19	January 10, 2013	Transcript, Letter of Understanding
R 20	Undated	Admission/Withdraw Maintenance
R 21	January 23, 2013	Email from [redacted] to Washington, et al.
R 22	January 11, 2013	Memorandum
R 23	November 17, 2011	Message from [redacted] to [redacted]
R 24	Undated	Parent Contacts

All of the Petitioners' 12 disclosures were admitted into evidence as exhibits. The Petitioners' exhibits are:

Ex. No.	Date	Document
P 1	December 13, 2012	Due Process Complaint Notice
P 2	April 9, 2002	Psycho-Educational Evaluation
P 3	Undated	[Three pages of an IEP]
	June 14, 2007	Multidisciplinary Team (MDT) Meeting Notes
P 4	December 8, 2011	Letter from Weaver to [Student]
P 5	December 9, 2011	Consent for Initial Evaluation/Reevaluation
	January 12, 2012	Confidential Psychological (Re-) Evaluation (See R 11)
	January 10, 2012	Social Work Assessment Report (See R 12)
P 6	December 12, 2011	Transfer of Rights Letter
P 7	February 23, 2012	Final Eligibility Determination Report

Ex. No.	Date	Document (cont.)
P 8	March 24, 2012	Comprehensive Psychological and Educational Evaluation
P 9	May 1, 2012	Final Eligibility Determination Report
	May 1, 2012	Prior Written Notice – Identification
	October 31, 2007	Service Ticket
	November 30, 2007	Service Ticket
	December 28, 2007	Service Ticket
	January 17, 2008	Service Ticket
	Undated	Proposed Areas of Concerns For [Student]
	Undated	Parent/Guardian Consent to Evaluate
	April 23, 2012	Disability Worksheet: Specific Learning Disability
P 10	Undated	Assessment Booklet
P 11	March 2, 2012	Independent Educational Authorizing Letter (with attached Parent Guide)
P 12	Undated	CV for [redacted]

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a [redacted] learner with a disability currently attending school at the Incarcerated Youth Program at the District of Columbia Detention Facility.[2] The Student is currently identified as a child with a disability under the Individuals with Disabilities Education Improvement Act (IDEA) definition for Specific Learning Disability (SLD).[3] The Student

[2] R 4, Testimony (T) of S, T of S.L.
[3] R 3, R 4.

was previously identified under the definition of Mental Retardation (Intellectual Disability), and that was changed in April 2012.[4] His cognitive functioning is in the Extremely Low range (his full-scale IQ is 62) and cognitive skills are significantly underdeveloped, however his adaptive functioning skills are in the adequate range (thus he was determined not to meet the definition of Mental Retardation any longer).[5] The Student's disabilities have impacted his ability to be involved in and progress in the general education curriculum and he is performing academically in the elementary school range across all academic areas.[6]

2. The Student has a long history of special education services, some disciplinary problems at school over the years, and cannabis use.[7] He has asserted he was not permitted to return to High School by a Dean due to allegations of smoking at school, and the Respondent denies this, based on a lack of expulsion records, and so it is not clear whether the Student stopped attending school or was illegally prevented from attending.[8] The Respondent lost the majority of the Student's education records.[9] Thus, it is not clear precisely why the Student is significantly underachieving academically.
3. Two years prior to the filing of the complaint in this matter the Student was incarcerated in prison, located out of State in North Carolina.[10] He was released from prison on February 14, 2011, and returned to a halfway house in the District of Columbia.[11] The Student participated

[4] P 8, R 3, R 4.
[5] P 8, R 6, R 7.
[6] R 4, R 10, P 8.
[7] T of S, P 8.
[8] T of S, P 8, R 19, R 20. (Whether the Student was illegally removed from school in 2009 is not before this Hearing Officer because the alleged action occurred more than two years prior to the complaint.)
[9] T of S.L. (Also this fact is based on the failure of the Respondent to comply with the Undersigned's order to provide all of the Student's education records to the Petitioners, providing only a small set of limited records.)
[10] T of S.
[11] T of S.

in some life skills classes for two hours per week at the halfway house and did not attempt to attend a Respondent school.[12]

4. The Student was again incarcerated on September 12, 2011, with the District of Columbia Department of Corrections.[13] The Student received no educational, include special education, services until late November 2011.[14] The Student did not have an IEP.[15] Nevertheless, the Student was provided a few hours educational services until his release on January 12, 2012.[16]
5. The Respondent began the reevaluation process for the Student in December 2011.[17] Several assessments, including an independent comprehensive psychological and educational assessment, were completed by April 2012.[18]
6. After the Student was released from custody, he did not attend school.[19] In April, an IEP team meeting was held to review the assessment reports and develop an IEP for the Student.[20] The IEP team placed the Student at Ballou Stay program and the Student did not attend because of questions he had about the program, which he never asked anybody about.[21]
7. The April 23, 2012, IEP required, in relevant part, the provision of 450 minutes of specialized reading instruction per week (7.5 hours) in the general education setting, 450 minutes of specialized writing instruction per week in the general education setting, 450

[12] T of S.
[13] T of S, R 21.
[14] T of S, T of G.W., T of S.L., R 18, R 19, R 21. (There was no explanation for the failure to provide educational services during this period, although the Respondent argued it may have been because records were missing.)
[15] T of G.W.
[16] R 18.
[17] T of G.W., P 4, P 5.
[18] P 8, R 8, R 10, R 11, R 12.
[19] T of S.
[20] R 3, R 6, R 7, T of G.W.
[21] T of S, T of G.W., R 4, R 6, R 7.

minutes of specialized math instruction per week in the general education setting, and 60 minutes of behavioral support services per week outside of the general education setting.[22]

8. The Student was again incarcerated from June 25, 2012, through July 2, 2012, and received no educational services during that period.[23]

9. The Student was again incarcerated on July 31, 2012, and has been in the custody of the District of Columbia until the present, at both the Central Detention Facility and the Central Treatment Facility, waiting for a sentencing hearing.[24] The Student's IEP has not been substantially implemented during this time.[25] The Student received no education services until December 2012 when G.W. saw Student at the Central Treatment Facility and told him to enroll in classes.[26] The Student saw G.W. once in December 2012, and has tried to see him Monday, Tuesday, and Wednesday afternoons in a classroom in unit 68, but the Student has often not been able to attend due to various scheduling issues with the Central Treatment Facility.[27] Such issues included a professional development day, a 30 year celebration, and G.W.'s reassignment.[28]

[22] R 4. (The IEP was not challenged in this complaint.)
[23] T of S, R 21. (Education programs at the facilities are provided based on the regular school year, and the Student's IEP did not require extended school year services, despite his lack of involvement and progress in the general education curriculum. T of G.W., T of S.L., R 4.)
[24] T of S, T of G.W., R 21.
[25] T of S, T of G.W., T of K.C., T of S.L. (The Respondent argued that the Student had been called for services six times between August 27 and September 4, 2012. R 22, T of S.L. However, the Student testified credibly that he had never been called for services and the Respondent did not put on any additional evidence other than the email report, which was not a contemporaneous record and the author of the message did not testify or explain how the Student was contacted. In fact, S.L. acknowledged that Respondent's communications to Student may not have been successful due to the involvement of other agency staff (either the Corrections Corporation of America or Department of Corrections)).
[26] T of G.W., T of S, T of S.L. (S.L. testified that the Student did not receive services until January 2013.)
[27] T of G.W.
[28] T of G.W.

10. The Central Treatment Facility is run by a private corporation, Corrections Corporation of America, for the District of Columbia.[29] The Central Detention Facility is run directly by the District of Colombia, through the Department of Corrections.[30]
11. Male and female, and adult and juvenile students are strictly segregated at the facilities.[31] The scheduling for classes is handled by the facilities and at the Central Treatment Facility males only have classes in the afternoon from 1:00 p.m. until 4:00 p.m.[32] There are only males at the Central Detention Center, so classes are provided from 8:45 a.m. until 3:15 p.m.[33] Classes are not provided outside of the regular teacher daytime contract hours.[34]
12. The Respondent lost many of the Student's educational records.[35] The Respondent tracks students entering the correctional system through multiple databases, some of which are shared with the Department of Corrections.[36] The Registrar is responsible to have a student who refuses educational services sign a document to that effect, and this was not done in this case.[37]
13. There are approximately 32 students with IEPs at the two facilities with three different areas of classrooms.[38] There are four classrooms at the Correctional Detention Facility (where Student was located at the conclusion of the due process hearing) with room for several students each and up to ten students in one or two of the classrooms.[39] There was only one

[29] T of G.W., T of S.L.
[30] T of G.W., T of S.L.
[31] T of S.L., T of G.W.
[32] T of S.L., T of G.W.
[33] T of S.L.
[34] T of S.L., T of G.W.
[35] T of S.L.
[36] T of S.L.
[37] T of S.L.
[38] T of S.L.
[39] T of S.L. (Upon review of three of the classrooms, one was very small and did not appear it could hold ten students, as S.L. testified.)

special education teacher at the Central Treatment Facility.[40] The IEP was not able to be fully implemented at the Central Treatment Facility, but can be fully implemented at the Central Detention Facility.[41]

14. The Student has only about four credits earned toward graduation and he will not earn enough to graduate by the time the current school year ends (at which time he will be 22 years of age).[42] While the Student can learn, he could be served by some remedial academics and vocational courses to move him closer to further education, employment, and independent living.[43] The Student has shown positive academic growth when provided specialized instruction while incarcerated.[44]
15. Youth in Transitions (YIT) is a residential program in Baltimore, Maryland, that serves young adult students with disabilities.[45] YIT provides vocational education, academics, and related services as needed.[46] The Student could participate in the residential program and be provided with academics and related services, such as counseling, and could be provided vocational education in a trade of his choosing.[47] The Student would be continually supervised, including at the residential facility.[48] The YIT program has a 75% to 80% success rate with adults, in terms of maintaining them in the community, home, job, and educational environments.[49]

[40] T of S.L.
[41] T of S.L.
[42] R 19, T of G.W.
[43] T of G.W., T of K.C.
[44] R 19, T of G.W., T of S.L.
[45] T of R.N.
[46] T of R.N.
[47] T of R.N.
[48] T of R.N.
[49] T of R.N.

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. *Schaffer v. Weast,* 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. The requirements of IDEA apply to "State and local juvenile and adult correctional facilities[.]" 34 C.F.R. § 300.2(b)(1)(iv).
3. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

> special education and related services that –
> (a) Are provided at public expense, under public supervision and direction, and without charge;
> (b) Meet the standards of the SEA, including the requirements of this part;
> (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. All students with disabilities, aged three to twenty-two, are entitled to a FAPE in the District of Columbia. D.C. Mun. Regs. §§ 5-E3000 & E 3002.

3. The IDEA "is violated when a school district deviates *materially* from a student's IEP." Wilson v. D.C., 770 F.Supp. 2d 270, 275 (D.D.C. 2011), *citing:* Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] *material* failure to implement

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

4. Students with disabilities incarcerated in the District of Columbia jail, on an interim basis (i.e. waiting to be convicted as an adult and incarcerated in an adult prison) are entitled to the services in their IEPs. *See,* 34 C.F.R. § 300.324(d)(1), and comments to regulations:

> One commenter recommended requiring that children with disabilities incarcerated in local jails continue with their established school schedules and IEP services, which States may provide directly or through an LEA.
>
> *Discussion:* No change to the regulations is needed. Section 300.324(d)(1), consistent with section 614(d)(7) of the Act, specifies the requirements of the Act that do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. If a child with a disability is incarcerated, but is not convicted as an adult under State law and is not incarcerated in an adult prison, the requirements of the Act apply. Whether the special education and related services are provided directly by the State or through an LEA is a decision that is best left to States and LEAs to determine.

71 Fed. Reg. 46686 (2006).

5. In this case there was a material failure to implement the IEP as written. First, two years prior to the filing of the complaint in this matter, the Student was incarcerated in North Carolina, until mid-February 2011. At that time the Student was at a half-way house and did not approach the Respondent for educational services. Because he did not do so, the Respondent had no way to know he was even available for educational services. In September 2011, the Student was again incarcerated in the District of Columbia. At that point, because he was in the custody of the District of Columbia, the Student's whereabouts were known and he could have been provided with educational services. But he was not provided educational services, including special education, until November, 2011. At that point, the Respondent realized it did not even have an IEP for the Student. Thus, special education services (even though some were provided) were not provided in conformity with an IEP. (The Respondent argued that the Student was "voluntarily withdrawn" from the education system. However, the Student had never been exited from special education, including the requisite evaluation, notice, and opportunity to object to such a changed in educational placement. Thus, the Respondent had an obligation to maintain some record of the Student where it had not been requested to provide the Student's educational records to another education agency.) The period of time the Respondent clearly had a responsibility and ability to deliver special education and related services to the Student in conformity with an IEP was from September 12, 2011 through January 12, 2012. On January 12, 2012, the Student was again released. He did not voluntarily attend school. Nevertheless, the reevaluation process proceeded and an IEP team meeting took place in April, 2012. A new IEP was developed at the meeting and the Student's proposed placement was at the Ballou Stay program. The Student, when he learned

of this, did not attend. The Student was again incarcerated in the District of Columbia for a short time from June 25, 2012, through July 2, 2012, and then on July 31, 2012 until the present. There is no evidence the Student was provided any services in conformity with his IEP June 25, 2012 through July 31, 2012, nor from July 31, 2012, through the present. In fact, only minimal services have been provided to the Student since December 2012, and not in conformity with the IEP. The Respondent argues that it attempted to provide special education services starting in August 2012, but the Student refused. The Student testified he was never called for educational services. The Respondent's evidence to the contrary is an email from a staff person to the Respondent's attorney, written on January 1, 2013. The Student's testimony carries more weight than this documentary hearsay.[50] It was not until his teacher saw him, in December 2012, that the Student was told to start attending school while incarcerated. Even then, the services were not provided in conformity with the IEP. Thus, there was a material failure to implement the IEP during the times the Student was in the custody and control of the State, and the Student was denied a FAPE.

6. The parties agree that the Student is not a convicted adult incarcerated in an adult prison and that, as a result, the provision to modify the IEP in 34 C.F.R. § 300.324(d)(1) does not apply. Thus, the IEP must be implemented as written. It is only logical that at times services may be interrupted due to bona fide security or compelling penological interests, but the IEP must generally be implemented as written, as required for FAPE pursuant to 34 C.F.R. § 300.17, and 34 C.F.R. §§ 300.101 and 300.102. The Respondent's failure to provide special education and related services in this case, to the extent explained, are tied to its own policies, procedures, and contracts. For example, it did not keep track of the Student's education records and did not have an effective way of identifying the Student upon his entry

[50] S.L.'s testimony was based on this email, not first hand knowledge.

into the D.C. Jail, did not have the staffing in place to provide the services required in the IEP and limited itself to present contractual limits (rather than obtaining contracts or funding other means to ensure the IEP was implemented), and did not otherwise ensure the Student was provided the services the IEP team determined were necessary to provide the Student a FAPE.

7. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). The Petitioner has requested two forms of relief to remedy this matter: the provision of the services required by the IEP, and compensatory education or prospective placement at Youth In Transitions, a residential program in Baltimore, Maryland. Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel, Reid v. District of Columbia, 401 F.3rd 516, 523, (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., *citing* Reid, 401 F.3d at 524; *see* Stanton ex rel. K.T. v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010).

8. The IDEA requires the IEP be implemented as written, so that is so ordered herein, until it is changed by the IEP team, including the Student. Because compensatory education is an equitable remedy, and because the Student has contributed to his denial of FAPE simply by not attending school when he was not incarcerated, the compensatory services to be provided must be tailored in consideration of this factor, as well as what will place him in the position he would have been but for the Respondent's denial of FAPE. In order to put the Student in the place he would have been, but for the Respondent's failure to provide special education and related services in conformity with an IEP that met the requirements of 34 C.F.R. §§ 300.320 through 300.324, at the times the Student was incarcerated in the District of Columbia, and considering the times the Student was not incarcerated and did not attend school, compensatory education and services to provide both academics and vocational training will be provided to the Student at a residential facility, such as Youth In Transitions in Baltimore, MD, for at least one full calendar year and as specified in the order herein. The facts of this case do not further specify the services to provide, other than the Student is significantly behind his same age peers in academic performance, so much so that graduation with a diploma is unlikely (and it is not clear how or why the Student is still performing at an elementary age level in academics, e.g. a lack of appropriate instruction, a lack of attendance, other things, or a combination of things), and that vocational education (an organized educational program directly related to the preparation of the Student for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree) will be essential to enabling him to prepare him for any further education, employment, and independent living. *See* 34 C.F.R. §§ 300.1 & 300.39(b)(5). A reasonable approach to designing an equitable compensatory education remedy on the record here is to

consider the amount of time his IEP was not implemented while he was in custody (in excess of ten months) and consider his current ability to be involved in and progress in the general education curriculum (he cannot, because he is still on an elementary grade level), consider why he is not currently progressing in and involved in the general education curriculum (this is not known, given the significant deficits in his academic performance and lack of information about his educational progress over the years, much of which would have been recorded in the Respondent's records which Respondent largely failed to provide) and consider what it may take to move him closer to being involved in and progress in the general education curriculum and, ultimately, being prepared for any further education, employment, and independent living. The Petitioners, in closing, argued that the Student is entitled to up to five years of compensatory education. The Petitioners have not convinced the Undersigned that the Student, while he may need such services, is entitled to such an award based on the Respondent's failure to provide special education and related services for the ten months it should have, given the Student's incarceration, since December 2010. The evidence shows that while the Student was incarcerated he would and did participate in educational services when provided to him. The Respondent has simply failed to provide the services in conformity with an IEP. Given the Student's incarceration and progress in academics when academic instruction is provided, the Student would have made considerable academic progress while incarcerate had the requisite academic services, including specialized instruction, been provided. Also, given the Student's lack of attendance at school over the last two years when not incarcerated, he may not be as engaged in instruction, and so the proposal for a residential program following the Student's release is appropriate, along with some additional time to account for the addition of vocational education, is appropriate

to remedy the denial of ten months of appropriate educational services. All these things considered, it is the Undersigned's conclusion that based on the facts here the equitable remedy is one full calendar year (12 months) of consecutively provided compensatory education services to remedy this denial of FAPE, as described in the order below.

VII. DECISION

The Respondent denied the Student a FAPE when it failed to provide the Student with special education and related services in conformity with an IEP that met the requirements of 34 C.F.R. §§ 300.320 through 300.324, while he was incarcerated in the District of Columbia from: September 12, 2011 through January 12, 2012 and July 31, 2012, through the present.

VIII. ORDER

1. The Respondent must work with the Department of Corrections, OSSE, and its own staff or contractors to ensure the IEP is implemented as written while the Student is incarcerated in the District of Columbia. Further, the Respondent must provide notice to the Student, if he is released from the custody of the State, of his educational placement and rights under IDEA.
2. The Student will be provided 12 consecutive months of compensatory education following his aging out of special education services. The compensatory education will be provided every month for a full calendar year. The compensatory education will consist of continued special education and related services in conformity with his IEP, including appropriate revisions. This includes being incarcerated in an adult prison, although the provisions of 34 C.F.R. § 300.324(d) apply. (The Respondent may need to coordinate with the State in which the Student is in prison to ensure this HOD is implemented, including paying for services that State would not necessarily provide.)

3. If the Student is released from custody prior to aging out, or during the year following his aging out, the Student will be enrolled in the Youth in Transitions residential program in Baltimore, MD, and will attend that program for the remainder of the year of compensatory education. At the Youth in Transitions program the Student's services will include academic instruction consistent with his IEP and vocational studies, and vocational training, and will be provided year-round.
4. If proper written notice is provided to the Student, and he refuses to take advantage of any of the services required herein, the Student will be deemed to have waived his right to the compensatory education services herein. He will not have waived his right to receive special education and related services in conformity with his IEP until he ages out. If the Student is released from custody prior to or during the period of his compensatory education services, he must notify the Respondent in accordance with instructions to be provided by the Respondent, about his release and desire to enroll at the YIT program consistent with this Order. If the Student fails to notify the Respondent, in accordance with its instructions, within two weeks of his release, he will be deemed to have waived his right to this award of compensatory education.
5. The compensatory education services, including the residential and vocational programs at YIT, are to be provided at no expense to the Student or his family.

IT IS SO ORDERED.

Date: February 19, 2013

Jim Mortenson, Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).