

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

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

Date Issued: May 11, 2012

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE  
STUDENT HEARING OFFICE  
2012 MAY 11 PM 12:27

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on March 5, 2012. A resolution meeting was held on March 14, 2012, and no agreements were reached. A response to the complaint was filed on March 15, 2012.

A prehearing was convened on March 16, 2012, resulting in an order that, among other things, clarified the issues for hearing, the substantive relief requested, and rules to follow concerning evidence and prehearing motions. One order required the parties to advise the undersigned regarding the impact the consent order resulting from case #2011-0350 has on the issues in the present matter. Briefs were to be filed no later than March 26, 2012. No briefs were

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<sup>1</sup> Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

filed and the parties' failure to advise the IHO as ordered is treated as acquiescence that the consent order has no impact on the present case.

Another order required the parties to file properly supported motions showing good cause for permitting a witness to testify via telephone. Any such motions were to be filed no later than April 13, 2012, to ensure that if granted, proper instruction and preparation could be made for witnesses testimony via telephone. The Petitioner made a timely motion for telephone testimony for three witnesses. The motion was denied on April 19, 2012, because it was not supported by any evidence and so good cause was not shown. The Petitioner's witnesses would be permitted to testify in person. The Respondent made an untimely motion for telephone testimony for four witnesses on April 24, 2012 (two days prior to the hearing). This motion was denied at the hearing on April 26, 2012, because it was untimely and no evidence was provided showing good cause. The Respondent's witnesses would be permitted to testify in person.

Trial briefs were submitted on April 19, 2012. The hearing was convened at 9:00 a.m. on April, 26, 2012, at 810 First Street NE, Washington, D.C. The hearing was closed to the public.

The due date for this HOD is May 19, 2012. This HOD is issued on May 11, 2012.

## **II. JURISDICTION**

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

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

The issues to be determined by the IHO are:

- (1) Whether the Respondent failed to provide the Student with an evaluation sufficiently comprehensive to identify all of his special education and related service needs when it did not conduct an occupational therapy assessment or an age appropriate transition assessment?
- (2) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose an individualized education program (IEP) that includes a behavior intervention plan (BIP) and does not enable the Student to graduate with a diploma?
- (3) Whether the Respondent failed to provide the Student with an educational placement determined by the IEP team and in conformity with least restrictive environment (LRE) requirements when the Respondent limited the educational placement options to be considered by the IEP team.
- (4) Whether the Respondent denied the Student a FAPE when it failed to provide the Student special education and related services in conformity with his IEP since November 21, 2010?

The substantive requested relief at the time of hearing was:

- (1) Independent educational evaluation consisting of an occupational therapy assessment and a vocational level II assessment.
- (2) Placement at North Spring, a residential facility.
- (3) Revisions to the IEP to include a BIP and ensure the Student has the opportunity to obtain a diploma.
- (4) Compensatory education.

The Petitioner has not shown the Student required an occupational therapy assessment or that the student interest inventory conducted in October 2011 was not an age appropriate transition assessment. The Respondent denied the Student a FAPE when it failed to propose an IEP that includes a BIP and because the IEP does not enable the Student to graduate with a diploma. The Respondent did not fail to provide the Student with an educational placement determined by the IEP team and while the placement determination process was flawed, as described herein, the

Petitioner has not shown the Student's educational placement does not meet LRE requirements. The Respondent did fail to provide written notice of its proposed placement and its refusal of the requested placement. This procedural violation, alone, did not result in a denial of FAPE, however. The Respondent denied the Student a FAPE when it failed to provide the Student special education and related services in conformity with his IEP since November 21, 2010.

#### **IV. EVIDENCE**

Eight witnesses testified at the hearing: three for the Petitioner, four for the Respondent, and one witness called by the IHO (the LEA representative at the hearing, Justine Douds (J.D.)). The Petitioner's witnesses were:

- 1) The Student's Mother, Petitioner (P)
- 2) Natasha Nelson, Psychologist, Parker Diagnostics (N.N.)
- 3) Kevin Carter, Special Education Advocate, James E. Brown & Associates (K.C.)

Respondent's witnesses were:

- 1) Max Maurice, Social Worker, DCPS (M.M.)
- 2) Special Education Teacher, DCPS
- 3) Courtney Davis, Special Education Coordinator, DCPS (C.D.)
- 4) Zoao Makumbi, School Psychologist, DCPS (Z.M.)

21 exhibits were admitted into evidence of 22 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 2	March 19, 2012	Resolution Period Disposition Form
P 3	March 19, 2012	Resolution Session Meeting Notes (See R 2)
P 4	April 12, 2012	Petitioner's Motion for Permission For Witness to Appear by Telephone for the Administrative Due Process Hearing
P 5	May 31, 2011	Consent Order (See R 11)

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 6	June 3, 2011	Psychiatric Evaluation
P 7	July 20, 2011	Confidential Comprehensive Psychological Evaluation (See R 10)
P 8	November 6, 2011	Functional Behavior Assessment
P 9	September 12, 2011	Email from Hill to Bright
P 10	February 26, 2010	IEP
P 11	February 26, 2010	MDT/CIP Meeting Notes
P 12	February 26, 2010	Manifestation and IEP Meeting Notes
P 13	March 9, 2010	Notice of Location Assignment
P 14	June 18, 2010	Report Cards
P 15	November 2, 2010	Report Cards
P 16	January 25, 2012	IEP (See R 6)
P 17	January 25, 2012	Multidisciplinary Team (MDT) Meeting Notes (See R 5) (and Advocate's meeting notes)
P 18	February 8, 2012	Meeting Notes (See R 3)
P 19	February 8, 2012	Letter from Douds to [Petitioner] (See R 4)
P 20	April 10, 2012	Email chain ending from Brown to Benkharafa (with attached application form)
P 21	Undated	Resume of Natasha Nelson
P 22	Undated	Resume of Rama Prayaga

13 exhibits were admitted into evidence of the Respondent's 13 disclosures. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	April 18, 2012	Attendance Summary
R 2	March 19, 2012	Resolution Session Meeting Notes (See P 3)
R 3	February 8, 2012	Meeting Notes (See P 18)
R 4	February 8, 2012	Letter from Douds to [Petitioner] (See P 19)
R 5	January 25, 2012	Multidisciplinary Team (MDT) Meeting Notes (See P 17)
R 6	January 25, 2012	IEP (See P 16)
R 7	January 25, 2012	Analysis of Existing Data
R 8	Undated	(classroom observation form)
R 9	February 15, 2012	Service Tracker
R 10	July 20, 2011	Confidential Comprehensive Psychological Evaluation (See P 7)
R 11	May 31, 2011	Consent Order (See P 5)
R 12	August 12, 2010	Functional Behavioral Assessment, Intervention Behavior Plan
R 13	Undated	Resume of Zoao Mengi Makumbi

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. To the extent

the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

#### V. FINDINGS OF FACT

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

1. Student is a     year old learner repeating the     grade at                     School.<sup>2</sup> The Student has been classified as a child with a disability under the definition of emotional disturbance (ED).<sup>3</sup> He has been diagnosed with Disruptive Behavior Disorder.<sup>4</sup>
2. The Student's cognitive functioning is in the borderline range.<sup>5</sup> He struggles with verbal and non-verbal reasoning.<sup>6</sup> He has deficits in short-term memory and difficulty keeping up pace on pen and paper tasks.<sup>7</sup> He has academic deficits in reading, math and writing.<sup>8</sup> However, he can learn and progress in the general education curriculum with proper instruction, supports, and services and has demonstrated such ability when his behavioral problems have not interfered.<sup>9</sup>
3. The Student's behavioral functioning results in a failure to attend or remain in class, and he has a history of oppositional behavior and fighting.<sup>10</sup> His disability affects his ability to focus

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<sup>2</sup>Testimony (T) of P, P 16/R 6.

<sup>3</sup> P 16/R 6.

<sup>4</sup> P 6.

<sup>5</sup> T of N.N., P 7/R 10.

<sup>6</sup> T of N.N., P 7/R 10.

<sup>7</sup> T of N.N., P 7/R 10.

<sup>8</sup> T of N.N., P 7/R 10.

<sup>9</sup> T of N.N., T of B.S., P 7/R 10, P 14, P 15.

<sup>10</sup> T of P, T of N.N., T of B.S., R 1, R 12, P 8, P 11, P 12.

on his work and to interact with his peers and teachers.<sup>11</sup> As a result, he requires a structured environment where rules and routines are predictable and he is consistently rewarded for appropriate behavior.<sup>12</sup>

4. The Student was publicly placed in a residential program in the spring of 2010 and was removed in the fall of 2010 after starting a fire in the building.<sup>13</sup> The Student repeatedly ran away from the residential program.<sup>14</sup> The Student's grades while at the program were As, Bs, and Cs.<sup>15</sup>
5. The Student was excluded from the Respondent's schools following his removal from the residential program in November 2010, until the fall of 2011 when he was permitted to attend an afterschool program, called the "Twilight Program" at School.<sup>16</sup>
6. In July 2011 the Student was evaluated by Dr. Natasha Nelson.<sup>17</sup> One of the components of the evaluation was the Developmental Test of Visual Motor Integration (VMI) which collected data on his visual-motor functioning.<sup>18</sup> The Student scored in the "Low Average" range on the assessment and a further Occupational Therapy (OT) evaluation was recommended by Dr. Nelson to determine whether school-based occupational therapy would be required for the Student.<sup>19</sup> School staff did not see functional problems with visual-motor

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<sup>11</sup> P 16/ R 6.

<sup>12</sup> P 16/ R 6, P 6, P 7/R 10, T of N.N.

<sup>13</sup> T of P.

<sup>14</sup> T of P.

<sup>15</sup> P 14, P 15.

<sup>16</sup> T of P.

<sup>17</sup> T of N.N., P 7/R 10.

<sup>18</sup> P 7/ R 10, T of N.N.

<sup>19</sup> P 7/ R 10, T of N.N.

skills, such as handwriting issues, and so the Respondent declined to perform an OT assessment.<sup>20</sup>

7. The Student was provided a “student interest interview” on October 18, 2011, which was used to collect data for his transition plan.<sup>21</sup> The assessment provided data on the Student’s academic interests, functional interests, and employment interests.<sup>22</sup>
8. The Student did not attend the Twilight Program regularly and his IEP team met to review and revise the IEP on January 25, 2012.<sup>23</sup> At the IEP team meeting, the Respondent proposed placing the Student in a self-contained classroom during the regular school day at Dunbar Senior High School or, alternatively, the Spectrum Program.<sup>24</sup> The Petitioner requested the Student be returned to a residential program which was refused.<sup>25</sup> The Respondent did not provide an explanation for its proposal (including other options considered and why rejected) nor its refusal.<sup>26</sup>
9. The Student was placed in the self-contained classroom following the January 2012 IEP team meeting, but he only had a special education teacher who was not content certified in any area of the general curriculum, and so the Student could not earn Carnegie units toward graduation outside of elective credits.<sup>27</sup> Thus, the IEP was changed by the Respondent to note the Student was to obtain a high school “certificate at age 21” rather than a diploma, despite no discussion of this at the IEP team meeting.<sup>28</sup>

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<sup>20</sup> T of B.S. (The record lacks a written notice of this refusal.)

<sup>21</sup> P 16/ R 6, T of C.D.

<sup>22</sup> P 16/ R 6.

<sup>23</sup> T of M.M., T of C.D., T of K.C.,

<sup>24</sup> T of K.C., T of J.D., P 17.

<sup>25</sup> T of P, T of K.C., P 17.

<sup>26</sup> T of K.C., (Also, a written notice of the proposal and refusal, pursuant to 34 C.F.R. § 300.503 is absent from the record.)

<sup>27</sup> T of B.S., T of C.D., P 16/R 6.

<sup>28</sup> P 16/ R 6, P 17, T of K.C., T of C.D.

10. The IEP includes six academic goals and one functional goal.<sup>29</sup> The functional goal is to improve his attendance.<sup>30</sup> Unspecified specialized instruction is to be provided outside of the general education setting for 26.5 hours per week, as is one hour per week of behavioral support services and transportation.<sup>31</sup> Supplementary aids and services in the classroom include: repetition of directions, simplification of oral directions, and the use of a calculator.<sup>32</sup> The IEP lacks any specific positive behavior interventions, although the Social Worker provides “reminders” to the Student to attend class.<sup>33</sup>
11. The IEP team meet again on February 8, 2012, to discuss locations of service and compensatory education.<sup>34</sup> There was agreement that the Student was entitled to compensatory services for missed services, but the parties did not agree on the amount of compensatory services.<sup>35</sup> The Respondent authorized 60 hours of specialized instruction and 30 hours of counseling, without any explanation or rationale, and the Petitioner wanted significantly more.<sup>36</sup>
12. The Student’s School Social worker claims to have created a BIP for the Student, but it is not part of the record and was not developed at an IEP team meeting.<sup>37</sup> The Social Worker is working on the Student’s interactions with people.<sup>38</sup>
13. The Student’s attendance remains sporadic, but his behavior has not otherwise been a problem at Dunbar.<sup>39</sup>

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<sup>29</sup> P 16/ R 6.

<sup>30</sup> P 16/ R 6. (This goal is not measurable as written. The IEP team is advised to revise it to avoid further compliance problems or another complaint.)

<sup>31</sup> P 16/ R 6.

<sup>32</sup> P 16, R 6.

<sup>33</sup> P 16, R 6, T of M.M.

<sup>34</sup> R 3/ P 18, T of K.C.

<sup>35</sup> R 3/P 18, T of K.C.

<sup>36</sup> R 3/P18, R 4/ P 19, T of K.C.

<sup>37</sup> T of M.M., P 16/ R 6, P 17.

<sup>38</sup> T of M.M.

## 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 Respondent is required to ensure that in "evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. § 300.304(c)(6).
3. Post-secondary goals are to be based on an age appropriate transition assessment related to training, education, employment, and where appropriate, independent living skills. 34 C.F.R. § 300.320(b)(1). Data must be collected on the child's strengths, preferences, and interests. 34 C.F.R. § 300.43(a)(2). A functional vocational evaluation must be considered, if appropriate. Id.
4. The Petitioner has not shown that the Student requires an OT evaluation. Dr. Nelson recommended an OT evaluation because the Student had scored in the "low average" range on a screening of visual-motor functioning. Teachers did not see any functional problems in

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<sup>39</sup> T of B.S., T of M.M., T of Z.M., T of J.D.

the classroom, such as difficulty with handwriting. Thus, the determination not to provide an OT assessment was not unreasonable. This determination required a written notice consistent with 34 C.F.R. § 300.503, which was not provided. The evidence does not demonstrate this violation resulted in a denial of FAPE and it was not argued by the Petitioner.

5. The Respondent conducted a student interest inventory in October 2011. This data was used as a basis for the post-secondary goals in the Student's IEP. The Petitioner has not shown that the inventory failed to collect data on the Student's strengths, preferences, and interests, nor that a functional vocational evaluation is necessary.<sup>40</sup>
6. 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. The Supreme Court, in Board of Educ. v. Rowley, 458 U.S. 176 (1982), provided an analysis to examine the “basic floor of opportunity” or education benefit for children with disabilities who are mainstreamed. Id. at 201-205. However, according to the Court in Rowley:

It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable at the other end, with infinite variations in between. . . . We do not attempt today to establish one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

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<sup>40</sup> As the Student progresses through secondary school, other age-appropriate transition assessments may be necessary.

Id. at 202. Thus, Rowley does not provide the basis for the analysis in this case where the Student is to receive 26.5 hours per week of specialized instruction in a self-contained classroom. The analysis is thus based solely upon the requirements stated in the IDEA.

7. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA’s purpose. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. While IDEA lacks “any substantive standard prescribing the level of education to be accorded handicapped children[,]” such as reaching their ““full potential commensurate with [their peers,]”” the education provided must be “meaningful”. Rowley at 186 (*internal citation omitted*), and 189 (1982). The outcome of an appropriate, meaningful education services is a diploma for children who are not so cognitively impaired they cannot participate fully in the general education curriculum. *See*, D.C. Mun. Regs. § 5-E2203, Rowley at 202 (“It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills.”), *and e.g.*, 34 C.F.R. § 200.1(d) “For students under section 602(3) of the Individuals with Disabilities Education Act with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards— (1) Are aligned with the State's academic

content standards; (2) Promote access to the general curriculum; and (3) Reflect professional judgment of the highest achievement standards possible.”

8. Federal regulations at 34 C.F.R. § 300.320 lists the required contents of an IEP:

- (a)(1) A statement of the child’s present levels of academic achievement and functional performance, including—
    - (i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
    - (ii) For preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities;
  - (2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
    - (A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
    - (B) Meet each of the child’s other educational needs that result from the child’s disability;
  - (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
  - (3) A description of— (i) How the child’s progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
  - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
  - (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —
    - (i) To advance appropriately toward attaining the annual goals;
    - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
    - (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
  - (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
  - (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
  - (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
    - (A) The child cannot participate in the regular assessment; and
    - (B) The particular alternate assessment selected is appropriate for the child; and
  - (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.
- (b) Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include —
- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
  - (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

9. With regard to the Student's behavior, the IEP fails to address all of his functional needs resulting from his emotional disturbance. The IEP only includes a goal to address his attendance and not his behavior in the classroom including his interpersonal relations. A BIP describes how the behavior of a child with a disability will be effectively addressed by the staff at school. *See*, 34 C.F.R. § 300.530 and D.C. Mun. Regs. § 5-B2510. The school social worker testified that he created a BIP for the Student to address his interactions with other people. This BIP was not created by the IEP team and has not been seen by anyone other than, perhaps, the social worker. The Student's disability is one that primarily impacts his behavior which, in turn, affects his ability to be present to access the general education curriculum. A BIP, which is the special education, related services, and/or supplementary aids and services, based on appropriate measurable functional goals in the IEP, is lacking in the IEP. Thus, the IEP is not reasonably calculated to enable the Student to be involved in and progress in the general education curriculum and has denied him a FAPE.

10. D.C. Mun. Regs at § 5-E2203.6 provides:

A student with special needs who does not achieve a diploma, as set forth in § 2203.4 shall be eligible to receive a Certificate of Individual Educational Program (IEP) completion. The decision to pursue a program leading to an IEP Certificate of Completion shall be made by the IEP team including the parent(s) and where possible, the student. The decision shall be made no earlier than the 9<sup>th</sup> grade and shall be attached in writing to the student's Individualized Education Program (IEP). DCPS shall comply with the Individuals with Disabilities Act, 2004 (IDEA) as addressed in DCMR, Title V, Chapter 30, with regards to appropriate transition assessments.

11. The IEP team did not discuss or determine that the Student would pursue a program leading to an IEP Certificate of Completion. Rather, this determination was made unilaterally by the Respondent because it failed to provide the staff necessary to ensure the Student could earn all of the credits toward a diploma. The explanation that this determination was temporary is not an excuse to the requirement that the IEP team make the determination and that the purpose of the IDEA is to ensure children with disabilities have the opportunity to be

involved in and progress in the general education curriculum, not to segregate them from the general education curriculum (even if they must be segregated from the general education environment and even if they are to work toward alternate academic achievement standards, which this Student is not). Thus, the Student's IEP was not reasonably calculated to enable the Student to be involved in and progress in the general education curriculum when the Respondent decided the Student would pursue a program leading to an IEP Certificate of Completion, denying the Student a FAPE.

12. Placement "refers to the provision of special education and related services rather than a specific classroom of specific school." 71 Fed. Reg. 46687 (August 14, 2006). Students must be educated with non-disabled peers to the maximum extent appropriate and special classes separate schooling, or other removals of children with disabilities may occur only if the nature or severity of the Student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved. 34 C.F.R. § 300.114(a)(2).

Placement decisions must be:

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

Furthermore, the placement decision must be:

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

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

13. The IEP team for the Student did determine his placement at the January 25, 2012 team meeting. No written notice of the placement determination nor the refusal of the Petitioner's requested placement was provided, and there is no evidence this procedural failure denied the Student a FAPE. The LRE was not taken into consideration by the IEP team. The Respondent proposed two placements: the self-contained classroom at Dunbar and the Spectrum program. No evidence of the reasons for these proposals was provided. No written notice of the placement, other placements considered and why rejected, including the Petitioner's request for residential placement, pursuant to 34 C.F.R. § 300.503, was provided. Nor do the meeting notes and testimony of the people at the meeting reflect the rationale for the proposals and refusal. Despite the team's failure to consider the LRE, given the evidence in the record, the Petitioner has not shown the Student's placement in the self-contained classroom was not appropriate. (The Respondent's failure to adequately staff the classroom so that the Student could be involved in and progress in the general education curriculum is a separate issue and does not reflect on the placement determination.) The Petitioner requested a residential placement, but the evidence shows such a placement has not been appropriate for the Student. In fact, every time the Student has been placed in a residential program, he has been determined to leave it. The Student can remain in a less restrictive setting than residential at this time, with appropriate special education, related services, and supplementary aids and services. The Respondent is not required to ensure a maximum level of educational performance as long as the educational services provided are meaningful, so that the Student will be involved in and progress in the general education curriculum, and have the opportunity to graduate with a diploma.

14. 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.
15. 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.3<sup>rd</sup> 516, 523, 43 IDELR 32, (p 5, p 6) (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).

16. There is no dispute that the Student was denied educational services. The parties disagree, rather, on how to address that denial. Neither party has put forth a reasonable rationale for their proposals for compensatory services. In this case, the Student has fallen behind in the credits required for graduation. This is the harm resulting from the denials of FAPE. In order to put the Student in the place he would have been but for the denials of FAPE, he will be provided opportunities to earn the missed credits over the course of the summer of 2012 and 2013. The IEP team will determine the classes or tutoring the Student requires in order to be caught-up by the start of the 2013-2014 school year. The team will do this by examining the credits the Student is lacking as a 10<sup>th</sup> grader and determine which subjects the Student will be provided classes or tutoring over the summer and the subsequent summer, if necessary. This remedial work may occur over the course of the regular school year, and if it does, any missed classes or credits preempted by the remedial work will be addressed during the summer of 2013.

## **VII. DECISION**

The Respondent prevails on issue 1 because the Petitioner did not show that the Student required an OT assessment nor that the transition assessment conducted in October 2011 was not an age-appropriate transition assessment.

The Petitioner prevails on issue 2 because the Respondent failed to propose an IEP reasonably calculated to enable the Student to be involved in and progress in the general education curriculum when the IEP proposed on January 25, 2012, lacked a BIP and had the Student on a "certificate" track as opposed to a diploma track.

The Respondent prevails on issue 3 because the placement determination was made by the IEP team and the Petitioner did not show it was not based on LRE requirements.

The Petitioner prevails on issue 4 because the parties agree the Student was denied educational services and is owed compensatory education services. The specific award of such services has, thus, been determined by a fact-specific analysis by the undersigned and is awarded herein.

## **VIII. ORDER**

1. The IEP team must meet on or before May 31, 2012, to revise the Student's IEP to include a BIP that addresses his functional behavioral needs regarding interactions with other people and attendance. The BIP will include positive behavior reinforcement. The BIP will include daily check-in with a school psychologist or social worker to discuss the Student's feelings, classes, social interactions, and attendance. This staff person will periodically, and at least weekly, conduct classroom observations of the Student and/or obtain weekly reports from the Student's teachers as to his attendance and affect, and use these reports in working with the Student and his teachers. This staff person will also confer with all of the Student's teachers

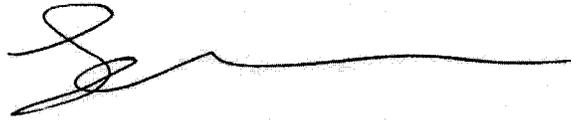
prior to the start of the semester or other calendared block of classes or tutoring, to describe the Student's needs and discuss the Student's IEP, including the BIP, and advise the teacher how to work with the Student and how the staff person will support both the teacher and the Student. This staff person will support the Student at all times throughout the calendar year when the Student is being instructed by the Respondent.

2. The IEP will also be changed to reflect that the Student will, upon successful completion of secondary credits, obtain a regular diploma. The Student must be provided with instruction to enable him to successfully complete secondary credits in his current educational placement, or whichever placement the IEP team next determines appropriate for the Student.
3. As compensatory education for the services missed, the Student will be provided extended school year (ESY) services during the summer of 2012 and 2013. ESY services will consist of instruction in credits the Student is lacking but should have been provided access to since November 21, 2010. The ESY services will include all the supports required by the IEP, including the support of the school psychologist or social worker as described above. ESY services will begin no later than the second week following the end of the regular school year and will end no sooner than the second week prior to the start of the following school year. The IEP team will determine how the ESY services are delivered (e.g. through classes tutoring, public, or contracted private providers, etc.). The Respondent must comply with the IEP team's determinations. The Student is required to attend these services or the Respondent should not be held responsible for the lack of educational benefit, unless the BIP required herein is not created or implemented.
4. The Respondent must propose at least three dates and times to meet, not all consecutive, for the purposes of fulfilling this order. The Respondent must advise the Petitioner of the date

and time the IEP team meeting will occur if she fails to respond or fails to choose one of the proposed times.

**IT IS SO ORDERED.**

Date: May 11, 2012

A handwritten signature in black ink, consisting of a stylized 'J' followed by a long horizontal line.

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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).