

**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: June 5, 2012

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

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OSSE  
STUDENT HEARING OFFICE  
2012 JUN - 5 PM 3: 27

**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 30, 2012. Included with the complaint was a motion for an expedited hearing. A prehearing was convened on April 10, 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. The motion for an expedited hearing was discussed and the motion denied. A response to the complaint was also filed on April 10, 2012.

A resolution meeting was held on April 13, 2012, and no agreements were reached.

One of the orders in the prehearing order of April 10, 2012, required the Respondent to provide the Petitioner a list of the types and locations of education records collected, maintained,

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

or used by the Respondent, pursuant to 34 C.F.R. § 300.616, by the end of the day on April 10, 2012. On April 13, 2012, the Petitioner informed the undersigned that the prehearing order of April 10, 2012, was not complied with including that no list of education records had been provided. A second prehearing conference was held to discuss this on April 18, 2012, and a second prehearing order was issued April 20, 2012. Also, on April 18, 2012, the Respondent provided the Petitioner with some educational records, although they were not listed or indexed in any way. The second prehearing order gave the Respondent another opportunity to comply with the undersigned's directives, and specified the sanction that would be applied if the Respondent continued to fail to comply. On April 25, 2012, the Respondent provided a list of the types and locations of the Student's educational records. Unfortunately, the list was not accurate. Petitioner filed a motion for sanctions on April 30, 2012, and the Respondent filed an opposition to the motion on May 3, 2012. A third prehearing order was issued on May 7, 2012, granting the Petitioner's motion and specifying the sanctions to be applied to ensure a fair hearing. These sanctions included limiting the Respondent's exhibits to those educational records the Petitioner had the opportunity to obtain by April 18, 2012, and that any witness testimony from the Respondent be limited to that which explained the permitted documentary evidence.

Disclosures were exchanged on May 9, 2012. The Petitioner filed an "emergency motion to strike" any and all disclosures from the Respondent that violated the third prehearing order on May 10, 2012. The Respondent filed an opposition to the motion and cross-moved to vacate the third prehearing order applying sanctions on May 10, 2012. The Petitioner filed an opposition to this motion on May 12, 2012. Both of the motions were denied at the hearing on the record. The Petitioner's motion to strike was denied because no records submitted in the Respondent's disclosures violated the third prehearing order and because no witnesses had yet testified in

violation of the order. The Respondent's motion to vacate the third prehearing order was based on the argument that the undersigned lacked the authority to sanction the Respondent's failure to comply with orders of the tribunal and also denied the Respondent its right to present evidence under 34 C.F.R. § 300.512(a) and (b). This motion was denied because the Independent Hearing Officer (IHO) has the authority and responsibility to ensure the hearing is conducted in a fair and efficient manner (*see*: Standard Operating Procedure (SOP) § 600.1, *and* Letter to Armstrong 28 IDELR 303 (OSEP 1997), and the sanctions were necessary to ensure fairness where the Respondent holds the advantage of being in possession of the Student's educational records and the Petitioner has the right to know what records and kept and where, in order to review and obtain those records, and where the Respondent has failed to inform the Petitioner of where records are in order to review and obtain them, a fundamental procedural safeguard in these matters. *See*: Schaffer v. Weast 546 U.S. 49, 60 (2005), *citing* Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 206 (1982).

Trial briefs were submitted on May 9, 2012. The hearing was convened at 9:00 a.m. on May 16, 2012, in room 2006 at 810 First Street NE, Washington, D.C., and concluded at 3:20 p.m. The hearing was closed to the public. The Petitioner was represented at hearing by Colin Bishop and Rebecca Sanfield, Student Attorneys supervised by Rangeley Wallace, Esq. The Respondent was represented by William Jaffe, Esq. and Tonya Chor, Esq.

At the hearing the Petitioner made a motion on the record for her "expert" witness to be present during the testimony of all witnesses. This motion was denied on the record because it was expected by the undersigned that the "expert" would testify based on her own knowledge and expertise, and that if the Respondent were to put on an "expert" witness, the Petitioner's "expert" would be permitted to be present for any rebuttal (and the Respondent would be

permitted to have an expert present during the testimony of the Petitioner's "expert" as well). The hearing concluded at 3:20 p.m. The due date for this HOD is June 13, 2012. This HOD is issued on June 5, 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. 5E, Chap. 30.

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

The issues to be determined by the IHO are:

- (1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to provide the Student with special education and related services in conformity with his individualized education program (IEP) from August 2010 to January 2011?
- (2) Whether the Respondent denied the Student a FAPE when it failed to propose or provide the Student an IEP reasonably calculated to enable him to be involved in and progress in the general education curriculum when the IEP, since January 2011, has not: a) included an accurate statement of the Student's present levels of academic achievement and functional performance; b) included a statement of measurable annual goals designed to meet his needs and enable him to be involved in and progress in the general education curriculum; and c) included appropriate and sufficient special education and related services and supplementary aids and services to enable him to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum?
- (3) Whether the Respondent failed to provide the Student an appropriate educational placement when it changed his placement to be more inclusive without sufficient supports and services since January 2011?
- (4) Whether the Respondent denied the Student a FAPE and significantly impeded the Petitioner's opportunity to participate in the decision-making process when prior written notice was not provided: a) in August 2010 concerning a change in

services; b) in January 2011 explaining changes in the IEP; and c) in February and April 2011 when it refused to change the Student's educational placement?

- (5) Whether the Respondent denied the Student a FAPE and significantly impeded the Petitioner's opportunity to participate in the decision-making process when it did not afford the Petitioner the opportunity to participate in the January 18, 2011, IEP team meeting?

The substantive requested relief at the time of hearing was:

- (1) Placement at a special school, specifically                      School in Maryland.
- (2) Compensatory education for a lack of progress on IEP goals and for remaining at the 4<sup>th</sup> and 5<sup>th</sup> grade levels in reading and mathematics despite being in secondary school, including Lindamood-Bell services over the summer of 2012 and a math tutor.

The Respondent denied the Student a FAPE as a result of failing to provide special education and related services in conformity with his IEP from August 2010 to January 2011. The Respondent denied the Student a FAPE when it failed to propose or provide him an IEP reasonably calculated to enable him to be involved in and progress in the general education curriculum when the IEP, since January 2011, has not always included: an accurate statement of his present levels of academic achievement and functional performance; a statement of measurable annual goals designed to meet his needs and enable him to be involved in and progress in the general education curriculum; and appropriate and sufficient special education and related services and supplementary aids and services to enable the Student to advance appropriately toward attaining the annual goals. The Student's educational placement was appropriate. Despite procedural failings with regard to providing prior written notices to the Petitioner and failing to ensure she was at the January 2011 IEP team meeting, the Petitioner's opportunity to participate in the decision-making process was not significantly impeded because she was informed of her rights, was assisted or represented throughout the time period in question, and was able to meet with the IEP team shortly after the January 2011 IEP team

meeting. FAPE was denied on the ground of failure to provide services and develop an appropriate IEP.

#### **IV. EVIDENCE**

Five witnesses testified at the hearing: four for the Petitioner and one for the Respondent. The Petitioner's witnesses were:

- 1) The Student's Mother, Petitioner (P)
- 2) Jocelyn Sweet, Student Attorney (J.S.)
- 3) Christin Mitchell, Administrative Assistant (C.M.)
- 4) Ellen Iscoe, Psychologist, (E.I.) (Petitioner's expert in child psychology, educational evaluation, and development and implementation of IEPs.)<sup>2</sup>

Respondent's witness was Cheryl Summers, DCPS School Psychologist (C.S.)

32 exhibits were admitted into evidence of 32 disclosures from the Petitioner. The

Petitioner's exhibits are:

| <u>Ex. No.</u> | <u>Date</u>       | <u>Document</u>  |
|----------------|-------------------|--|
| P 1            | January 16, 2008  | Comprehensive Psychological Re-Evaluation Report       |
| P 2            | February 16, 2011 | Educational Evaluation (See R 10) <sup>3</sup>         |
| P 3            | Undated           | Comprehensive Psychoeducational Evaluation             |
| P 4            | Undated           | Summary of Brief Re-Evaluation                         |
| P 5            | January 13, 2010  | IEP, Meeting Notes (See R 4, R 5)                      |
| P 6            | January 18, 2011  | IEP (See R 3)  |
| P 7            | April 26, 2011    | IEP (See R 2)  |
| P 8            | February 9, 2012  | IEP (See R 1)  |
| P 9            | January 31, 2012  | Review of Independent Educational Evaluation (See R 8) |
| P 10           | October 17, 2011  | Email chain ending from Sanfield to Boyd               |
| P 11           | November 4, 2011  | IEP Progress Report – Annual Goals (See R 7)           |

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<sup>2</sup> The witness provided testimony regarding IEP goals and educational placement and demonstrated she did not fully understand the legal requirements for such determinations. Thus, her testimony on IEP development, to the extent it dealt with legal compliance for same, is not given great weight.)

<sup>3</sup> The parties failed to ensure duplicate documents were not submitted in their disclosures. Duplicate documents are cross-referenced as noted.

| <u>Ex. No.</u> | <u>Date</u>       | <u>Document</u>                              |
|----------------|-------------------|--|
| P 12           | January 27, 2012  | IEP Progress Report – Annual Goals (See R 7) |
| P 13           | April 18, 2012    | IEP Progress Report – Annual Goals           |
| P 14           | October 5, 2010   | Service Tracker                              |
| P 15           | November 5, 2010  | Service Tracker                              |
| P 16           | December 13, 2010 | Service Tracker                              |
| P 17           | January 12, 2011  | Service Tracker (See R 6)                    |
| P 18           | March 1, 2011     | Service Tracker (See R 6)                    |
| P 19           | March 28, 2011    | Service Tracker (See R 6)                    |
| P 20           | May 6, 2011       | Service Tracker (See R 6)                    |
| P 21           | October 4, 2011   | Service Tracker (See R 6)                    |
| P 22           | November 7, 2011  | Service Tracker (See R 6)                    |
| P 23           | December 4, 2011  | Service Tracker (See R 6)                    |
| P 24           | January 5, 2012   | Service Tracker (See R 6)                    |
| P 25           | March 5, 2012     | Service Tracker (See R 6)                    |
| P 26           | April 13, 2012    | Service Tracker (See R 6)                    |
| P 27           | Undated           | Curriculum Vitae Ellen Iscoe                 |
| P 28           | August 2011       | [Student] Case Notes – Spring 2011           |
| P 29           | March 8, 2012     | Letter from Downing to Bishop                |
| P 30           | March 15, 2012    | Letter from Downing to [Petitioner]          |
| P 31           | Undated           | School ~ Laurel [Web site brochure]          |
| P 32           | Undated           | [Lindamood-Bell Brochure]                    |

13 exhibits were admitted into evidence of the Respondent's 17 disclosures.<sup>4</sup> The

Respondent's exhibits are:

| <u>Ex. No.</u> | <u>Date</u>      | <u>Document</u>                                      |
|----------------|------------------|--|
| R 1            | February 9, 2012 | IEP (See P 8)  |
| R 2            | April 26, 2011   | IEP (See P 7)  |
| R 3            | January 18, 2011 | IEP (See P 6)  |
| R 4            | January 13, 2010 | Multidisciplinary Team (MDT) Meeting Notes (See P 5) |
| R 5            | January 13, 2010 | IEP (See P 5)  |
| R 6            | April 13, 2012   | Service Tracker (See P 26)                           |
|                | March 5, 2012    | Service Tracker (See P 25)                           |
|                | January 5, 2012  | Service Tracker (See P 24)                           |
|                | December 4, 2011 | Service Tracker (See P 23)                           |
|                | November 7, 2011 | Service Tracker (See P 22)                           |
|                | October 4, 2011  | Service Tracker (See P 21)                           |
|                | May 6, 2011      | Service Tracker (See P 20)                           |
|                | March 28, 2011   | Service Tracker (See P 19)                           |
|                | March 1, 2011    | Service Tracker (See P 18)                           |
|                | January 12, 2011 | Service Tracker (See P 17)                           |
| R 7            | January 27, 2012 | IEP Progress Report – Annual Goals (See P 12)        |
|                | November 4, 2011 | IEP Progress Report – Annual Goals (See P 11)        |

<sup>4</sup> The Respondent's exhibits are not numbered consecutively due to an error in their submission.

| <u>Ex. No.</u> | <u>Date</u>       | <u>Document</u>   |
|----------------|-------------------|---|
| R 8            | January 31, 2012  | Review of Independent Educational Evaluation (See P 9)            |
| R 9            | February 9, 2011  | Consent for Initial Evaluation/Reevaluation                       |
| R 10           | February 16, 2011 | Educational Evaluation (See P 2)                                  |
| R 14           | February 9, 2012  | Final Eligibility Determination Report, Evaluation Summary Report |
| R 15           | April 29, 2011    | Evaluation Summary Report   |
| R 16           | April 1, 2011     | Letter of Invitation to a Meeting                                 |

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any 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 with disabilities enrolled in the     grade at     School.<sup>5</sup> He has low average cognitive functioning and a long history of emotional and behavioral problems.<sup>6</sup> He has difficulty breaking down speech sounds into their component parts and blending the sounds into words, which results in a weakness in skills important to spelling and reading.<sup>7</sup> The Student scored "Basic" in reading and math on the most recent State-wide academic assessment available, the DC-CAS for 2009-2010.<sup>8</sup> The prior year, 2008-2009, he had scored "proficient," even though other assessment data shows his academic functioning to be on the elementary level.<sup>9</sup> His grades have been reported as

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<sup>5</sup> Testimony (T) of P, P 9/R 8.

<sup>6</sup> P 2/R 10, P 3, R 9, R 14.

<sup>7</sup> P 3

<sup>8</sup> P 9/R 8.

<sup>9</sup> P 2/R 10, P 4, P 9/R 8, R 14.

passing this year.<sup>10</sup> His emotional distress, the underlying cause of which is not entirely clear from the record, renders sustaining attention difficult, resulting in interference with his academic functioning.<sup>11</sup> He may be prone to executive functioning difficulties when he feels overwhelmed.<sup>12</sup> The Student perceives himself in a highly negative way, feels sad and hopeless about the past and future, and is extremely angry, but does not always appear that way.<sup>13</sup> The Student sometimes engages in injurious behavior - punching walls - but rarely at school.<sup>14</sup> He leaves the classroom when he feels his emotions are not able to be controlled and is often absent from class.<sup>15</sup> On the rare occasion when he lashes out, such as when in a fight with another student, he often “blacks out” and cannot remember the details of his actions.<sup>16</sup> He has only had two of these episodes at school in the past year, both of which were precipitated by another student provoking him and resulting in the Student making a mess of a room or hallway and being disciplined.<sup>17</sup>

2. The Student’s IEP was last revised on February 9, 2012.<sup>18</sup> Prior to that date, it was revised, respectively, on April 26, 2011, January 18, 2011, and January 13, 2010.<sup>19</sup>
3. The January 13, 2010 revision of the IEP required unspecified specialized instruction outside of the general education setting for 20.5 hours per week, and behavioral support services outside of the general education setting for 60 minutes per week.<sup>20</sup>

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<sup>10</sup> T of C.S.

<sup>11</sup> P 3, T of E.I.

<sup>12</sup> P 3.

<sup>13</sup> P 4.

<sup>14</sup> T of P, P 3.

<sup>15</sup> T of P, R 14.

<sup>16</sup> P 3, P 4, T of P.

<sup>17</sup> T of P.

<sup>18</sup> P 8/R 1.

<sup>19</sup> P 7/R 2, P 6/R 3, P 5/R 5.

<sup>20</sup> P 5/R 5. (The IEP does not specify whether the specialized instruction to be provided the Student will consist of adapting the content, methodology, or delivery of the instruction.)

4. From the start of the school year in August, 2010, when the Student began attending until his IEP was revised the week of January 17, 2011, there were 20 weeks of school and the Student received 12 hours of behavioral support services.<sup>21</sup> No specialized instruction outside of the general education setting was provided to the Student until at least the second advisory of the 2010-2011 school year.<sup>22</sup>
5. The Petitioner was invited to an IEP team meeting in January 2011.<sup>23</sup> The Petitioner could not meet on the date of the meeting, January 18, 2011, so she informed her attorneys with the Disability Rights Law Clinic, and asked them to get the meeting date changed.<sup>24</sup> One of the attorneys, J.S., contacted the Special Education Coordinator and had the meeting changed to January 25, 2011, but the Respondent held the meeting on the originally scheduled date of January 18, 2011, anyway.<sup>25</sup> Another meeting was convened in February 2011 with the Petitioner present.<sup>26</sup> At that meeting the team agreed to conduct an assessment of the Student, but no prior written notice was provided to the Petitioner.<sup>27</sup>
6. The January 2011 revision of the IEP lacks a statement of the Student's present levels of academic achievement, including how his disability affects his involvement and progress in the general education curriculum.<sup>28</sup> The IEP includes a statement of the Student's level of academic achievement for August 2008, over two years prior.<sup>29</sup> It does reference "current

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<sup>21</sup> P 5/R 5, P 14, P 15, P 16, P 17/R 6. (Administrative notice is taken of the 2010-2011 DCPS school calendar.)

<sup>22</sup> T of P. (P testified, without contest, that it was not until the "second or third semester of ninth grade" that the Student began to receive special education classes. First, the Respondent does not measure the school year in semesters, but rather "advisories." Second, a semester would be the half-way point through the school year and there would be no "third" semester. Thus, it is the finding of the undersigned that the Petitioner meant "advisory" when she stated "semester." Furthermore, the Respondent is given the benefit of the doubt that the special education services began earlier, rather than later, given the Petitioner's ambiguous testimony.)

<sup>23</sup> T of P.

<sup>24</sup> T of P, T of J.S.

<sup>25</sup> T of J.S., T of P.

<sup>26</sup> T of P.

<sup>27</sup> T of P. (The record lacks any prior written notices.)

<sup>28</sup> P 6/R 3.

<sup>29</sup> P 6/R 3.

Curriculum based measurements” and provides no specificity other than the Student is “still performing below grade level.”<sup>30</sup> The IEP does state that the Student’s disability affects his functional performance because he lacks self-control, fails to follow school rules, and is hyperactive, all of which affects his “ability to function appropriately consistently in classroom. . . .”<sup>31</sup>

7. The two academic goals in the January 2011 IEP for math are aligned with secondary school standards (AII.P.4 and AII.P.7) and so are appropriate.<sup>32</sup> The two academic goals in the IEP for reading are vague and could apply to any grade level and so are not appropriate or measurable.<sup>33</sup> The two functional goals in the January 2010 IEP are vague and not measurable because they lack a specific level of expected performance.<sup>34</sup>
8. The January 2011 IEP changed the Student’s hours of specialized instruction from 20.5 hours per week outside of the general education setting, to 13 hours per week outside of the general education setting and 13 hours per week in the general education setting.<sup>35</sup> Behavioral support services were reduced from 1 hour per week to two hours per month.<sup>36</sup> There is no explanation, including a prior written notice, for the change in services in the IEP.<sup>37</sup>
9. The Student’s academic achievement was re-assessed on February 16, 2011, with a Woodcock-Johnson III Tests of Achievement (WJ-III).<sup>38</sup> Despite average ability in the area of mathematics, in just over three years from his prior assessment with the WJ-III, the Student made a year and a half of progress in Broad Reading skills (2.6 grade equivalency

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<sup>30</sup> P 6/R 3.

<sup>31</sup> P 6/R 3.

<sup>32</sup> P 6/R 3. (Citations to state academic standards are in parenthesis throughout these findings of fact.)

<sup>33</sup> P 6/R 3.

<sup>34</sup> P 6/R 3, T of E.I. (C.S. testified that the goals were adequate in her opinion. However, she provided no explanation or basis for her conclusion and so it is given no weight.)

<sup>35</sup> P 6/R 3.

<sup>36</sup> P 5/R 5, P 6/R 3.

<sup>37</sup> T of P, P 6/R 3.

<sup>38</sup> P 2/R 10.

(GE) to 4.0 GE), almost no progress in Broad Math skills (5.1 GE to 5.2 GE), and nearly two years' of growth in Broad Writing (3.2 GE to 4.9 GE).<sup>39</sup> He was in the 9<sup>th</sup> grade during the 2010-2011 school year.<sup>40</sup>

10. The IEP was then again revised in April 2011.<sup>41</sup> The statement of the Student's present levels of academic achievement and functional performance was revised to reflect the Student's current academic performance, including data based on the WJ-III, and that behavior was improved but for attendance.<sup>42</sup> A writing goal was added, but none of the annual goals were changed, nor were the services.<sup>43</sup> The added goal was not aligned with State writing standards.<sup>44</sup>

11. In May 2011 the Student was reevaluated independently by \_\_\_\_\_ with a Comprehensive Psychoeducational Evaluation, consisting of over 20 assessments as well as interviews.<sup>45</sup> The independent evaluation was provided to the Respondent on October 17, 2011.<sup>46</sup> The independent evaluation was reviewed by C.S., the school psychologist, who issued a report of her review on January 31, 2012.<sup>47</sup> C.S. found no flaws in the independent assessment and it is a reliable reflection of the Student's abilities and needs.<sup>48</sup>

12. The IEP was subsequently revised in February 2012.<sup>49</sup> The statement of the Student's levels of academic achievement was based on year-old data from the last WJ-III done and so was

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<sup>39</sup> P 1, P 2/R 10, P 9/R 8.

<sup>40</sup> P 2/R 10, T of P.

<sup>41</sup> P 7/R 2.

<sup>42</sup> P 7/R 2. (The IEP was not accurately revised, however, because it left in data from the prior WJ-III assessment that had been superseded as well as contradictory statements about the Student's behavior.)

<sup>43</sup> P 6/R 3, P 7/R 2.

<sup>44</sup> P 7/R 2.

<sup>45</sup> P 3. (Testing occurred on May 23 and 24, 2011, but the evaluation report is undated.)

<sup>46</sup> P 10.

<sup>47</sup> P 9/R 8.

<sup>48</sup> P 3, P 9/R 8.

<sup>49</sup> P 8/R 1.

not current.<sup>50</sup> The statement of the Student's present level of functional performance did not describe how his emotional disturbance affected his involvement and progress in the general education curriculum, only that it did.<sup>51</sup>

13. In the February 2012 revision to the IEP the academic goals were revised and the two math goals were aligned with secondary school standards (A1.N.2 and A1.N.1) and the two reading goals were aligned with 9<sup>th</sup> grade standards (9.LT-S.10 and 9.IT-E.1).<sup>52</sup> The Student did not achieve the two functional goals that had been in the IEP prior to revision, and they remained the same.<sup>53</sup> Two additional functional goals were added which were vague and not specific enough to be measured.<sup>54</sup>

14. The special education and related services in the IEP did not change with the February 2012 revision, and no prior written notice accompanied the IEP.<sup>55</sup>

15. The Student requires specialized instruction in reading, writing, and mathematics.<sup>56</sup> In all subjects the Student requires direct guidance daily in breaking down extended tasks and making and carrying out plans for their completion.<sup>57</sup> The Student requires a log to record assignments and to track his progress on the steps necessary for completion of each task.<sup>58</sup> He requires classwork to be provided via an auditory format, to take advantage of his relatively strong listening comprehension.<sup>59</sup> He must read along with audio instructions to practice "active listening."<sup>60</sup> The Student requires frequent opportunities to summarize small

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<sup>50</sup> P 8/R 1.

<sup>51</sup> P 8/R 1.

<sup>52</sup> P 8/R 1.

<sup>53</sup> P 8/R 1.

<sup>54</sup> P 8/R 1.

<sup>55</sup> P 7/R 2, P 8/R 1.

<sup>56</sup> P 3.

<sup>57</sup> P 3.

<sup>58</sup> P 3.

<sup>59</sup> P 3.

<sup>60</sup> P 3.

but meaningful “chunks” of novel information so that he can link them to one another in a meaningful summary in order to help identify areas of confusion in the material.<sup>61</sup> The Student requires repetition to lock new skills in place, including the use of flash cards for repeated drilling.<sup>62</sup> The Student requires the use of “reteaching” which is having him teach a new skill or explain a new concept to a teacher, or other adult.<sup>63</sup> “Warm-up” tasks that are related but less difficult than any novel skills being taught are required for the Student, as are multi-modal instruction and opportunities for “hands-on” and interactive learning.<sup>64</sup> The Student requires copies of all handouts, as well as notes that include key points and supporting details.<sup>65</sup> He requires the provision of a written syllabus with specific due dates and exam dates.<sup>66</sup>

16. To improve reading and writing fluency the Student requires instruction with highly familiar words which will move to progressively longer words over time.<sup>67</sup> He requires direction to read and spell common letter-sound patterns to help lock them into memory.<sup>68</sup> He requires strategies targeting phonologic processing so that he can more effectively break down and spell new words without having to memorize them.<sup>69</sup> He must be guided in the application of strategies that promote reading and listening comprehension.<sup>70</sup> He requires pre-reading and pre-listening strategies to improve efficiency of comprehension.<sup>71</sup> He requires instruction on how to relate new information to information he has learned in the past to improve his

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<sup>61</sup> P 3.

<sup>62</sup> P 3.

<sup>63</sup> P 3.

<sup>64</sup> P 3.

<sup>65</sup> P 3.

<sup>66</sup> P 3.

<sup>67</sup> P 3.

<sup>68</sup> P 3.

<sup>69</sup> P 3.

<sup>70</sup> P 3.

<sup>71</sup> P 3.

understanding of and memory for material he reads or hears.<sup>72</sup> He requires strategies for content mastery, such as taking good notes while reading or listening, identifying themes and main ideas, organizing information presented, and drawing inferences about what he has read.<sup>73</sup> He requires instruction in techniques for summarizing and interpreting what he has read or heard.<sup>74</sup>

17. The Student requires the use of a combination of typing supports and diction for writing.<sup>75</sup>

Lengthy, complex writing assignments must be dictated to help him focus on his ideas effectively, and then this must be read back to him to help him evaluate his ideas.<sup>76</sup> Over the course of the year typing aids, including the use of spell-check software designed for individuals with learning disabilities, must be provided to enable him transition away from dictation.<sup>77</sup> The Student requires the production of an outline to be reviewed with a teacher prior to beginning more extensive work on lengthy writing assignments.<sup>78</sup>

18. The Student requires the appropriate use of manipulatives and a calculator in math to

compensate for low math fluency and help him better focus on math concepts and regain confidence in his ability in math.<sup>79</sup> The Student requires math instruction that breaks down practical, real-world math problems by identifying key variables and relevant operations.<sup>80</sup>

The Student requires a “math manual” that identifies specific types of problems and common types of errors to watch out for on a given problem, as well as methods to avoid them.<sup>81</sup>

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<sup>72</sup> P 3.

<sup>73</sup> P 3.

<sup>74</sup> P 3.

<sup>75</sup> P 3.

<sup>76</sup> P 3.

<sup>77</sup> P 3.

<sup>78</sup> P 3.

<sup>79</sup> P 3.

<sup>80</sup> P 3.

<sup>81</sup> P 3.

19. The Student is able to function in an organized fashion in calm settings when given some structure, predictability, and gradual transitions.<sup>82</sup> He requires small, carefully supervised social settings, in and out of the classroom at school.<sup>83</sup> He requires an age-appropriate level of intellectual challenge with supports for his emotional and learning disorders as well as his attention and organizational challenges.<sup>84</sup> The Student requires a “calm-down” space when he is not able to remain in the classroom or becomes disruptive.<sup>85</sup>
20. The Student requires the aid of parent counseling and training to help stabilize his emotional functioning and enable him to be available for learning.<sup>86</sup> He requires a behavior therapist to counsel him daily on strategies for dealing with classroom pressure and remaining in class, to be available when he or his teacher requires assistance in keeping him in the classroom, and to help him, his teachers, and his Parent, manage the Student’s emotional disturbance.<sup>87</sup> Positive reinforcements are necessary to help him learn positive behavior, including attendance.<sup>88</sup> The Student requires weekly individual therapy to provide training, practice, and prompts to exercise emotional control strategies and safe opportunities to release emotional tension.<sup>89</sup> The Student requires weekly group therapy in a small group of individuals with similar challenges to receive hands-on practice in peer conflict resolution and help building more positive peer relationships.<sup>90</sup>
21. The Student requires the following accommodations on State and District-wide assessments to measure his academic achievement and functional performance: 50% additional time to

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<sup>82</sup> P 3.

<sup>83</sup> P 3.

<sup>84</sup> P 3.

<sup>85</sup> P 3, T of I.E.

<sup>86</sup> P 3.

<sup>87</sup> P 3, T of I.E.

<sup>88</sup> P 3.

<sup>89</sup> P 3.

<sup>90</sup> P 3.

complete the assessment; additional breaks during the assessment, including stopping the clock on the assessment; taking assessments in a separate, quiet room; writing his answers directly on the question form on multiple-choice assessments, rather than on scantron sheets; have assessment questions read to him, but for reading assessments; the use of a computer with spell-check software for writing assessments; a calculator with programmable scientific functions for math assessments; and the use of notecards and procedure cards during assessments.<sup>91</sup>

## VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. West, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:
  - special education and related services that –
  - (a) Are provided at public expense, under public supervision and direction, and without charge;
  - (b) Meet the standards of the SEA, including the requirements of this part;

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<sup>91</sup> P 3.

- (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.

Id. at 202. Thus, Rowley does not fully provide the basis for the analysis in this case where the Student’s IEP has required from 13 to 20.5 hours per week of specialized instruction outside of the general education environment, as well as related services outside of the general education environment. The analysis is thus based solely upon the requirements stated in the IDEA.

3. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). While IDEA lacks “any substantive standard prescribing the level of education to be accorded handicapped children[.]” such as reaching their ““full potential commensurate with [their peers,]”” the education provided must be “meaningful”. Rowley at 186 (*internal citation omitted*), and 189 (1982). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA’s purpose and what is “meaningful” under the Act. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. The evidence shows the

Student in this matter can perform at grade level he should be in chronologically if provided appropriate education services.

4. 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.
5. The Student was provided no special education services from the start of the 2010-2011 school year until at least the second advisory of the school year. In addition, just over half of

the related services he was to receive were provided. Thus, there was a material deviation from the IEP and special education and related services were not provided in conformity with it, denying the Student a FAPE.

6. 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.

7. The IEP revision in January 2011 lacked a current and complete statement of the Student's levels of academic achievement and functional performance. The only levels of academic achievement stated were over two year old, thus, the IEP lacked its very foundation. "The IEP Team's determination of how the child's disability affects the child's involvement and progress in the general education curriculum is a primary consideration in the development of the child's annual IEP goals." 71 Fed. Reg. 46662 (August 14, 2006). Two of the academic goals in the IEP were based on secondary education standards for math, but they were not aligned with any accurate or present levels of academic achievement. This is a procedural error because it is clear from assessment data that the Student had deficiencies in his math skills. The reading goals were vague, not measurable and not aligned with any state standards and could have applied to any student in any grade. The functional goals, likewise, were vague and not measurable.<sup>92</sup> The result is a flawed IEP that was not reasonably calculated to enable the Student to be involved in a progress in the general education curriculum because it lacked proper alignment between the statements of the Student's present levels of academic achievement and functional performance and the annual goals. As OSEP has stated:

This directly corresponds with the provision in § 300.320(a)(2)(i)(A) and section 614(d)(1)(A)(i)(II)(aa) of the Act, which requires the IEP to include measurable annual goals designed to 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. We do not believe further clarification is needed regarding the alignment of a child's present levels of performance with the child's annual goals.

With regard to the alignment of the IEP with the State's content standards, § 300.320(a)(1)(i) clarifies that the general education curriculum means the same curriculum as all other children. Therefore, an IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards.

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<sup>92</sup> Functional goals are generally not aligned with any standards because they are necessarily tailored to the individual characteristics of the child and there are no requirements for "functional" State standards as there are for academic standards.

Id. Thus, the lack of an accurate and complete statement of the Student's present levels of academic achievement and functional performance led to an IEP that was not aligned internally, and, with regard to reading, not aligned with state standards on which the Student was minimally capable of achieving, denying the Student a FAPE.

8. The statements of academic achievement and functional performance were revised (though not all of the IEP was correctly revised) in April 2011, effectively resolving that failure, but the goals remained unchanged. An additional goal was added to address writing, but this goal, like the reading goals, was not aligned with State standards. It also included a reference to his attendance being a remaining behavior problem, but no goal to address that problem was included. Only the math goals were appropriate at that point. It was appropriate to expect the Student to reach secondary school standards in math, despite his performance on the WJ-III, because of the legal requirement to provide special education and related services to enable the Student to be involved in and progress in the general curriculum, and because the Student had performed sufficiently well academically in his last State-wide academic assessment to score "basic" on the DC-CAS. The services to be provided to the Student, then, had to be designed to enable the Student to reach those goals within a year as well as continue to be involved in and progress in the general education curriculum. *See* 34 C.F.R. § 300.320(a)(4).<sup>93</sup>
9. The IEP was next revised in February 2012. This time, the statement of present levels of academic achievement and functional performance were not revised to be current, as they were in April 2011. All of the academic goals were revised to reflect secondary school standards, but they were not internally aligned with the statement of present levels of

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<sup>93</sup> That analysis will follow the review of the present levels of academic achievement and functional performance and annual goals.

academic achievement and functional performance. Because the academic goals were properly aligned with state reading and math standards, and because it was clear that reading and math were skill areas affected by the Student's disabilities, this lack of internal alignment is a procedural error. The functional goals remained unchanged and so were not only inappropriate but whatever progress had been made toward them was not sufficient to reach them, demonstrating the failure to the previous revisions of the IEP. The functional goals added were vague and not measurable. More importantly, a comprehensive reevaluation had occurred by this time, and the data contained in the evaluation report are not reflected in the IEP.<sup>94</sup>

10. 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;

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<sup>94</sup> There is no requirement that the findings or recommendations of any particular evaluation or assessment be incorporated into an IEP. However, an IEP must be based on current data. If there are reports with different data, or the IEP team discounts the some or all of the data in a given report, it must explain why in the written notice pursuant to 34 C.F.R. § 300.503. The data from the May 2011 evaluation was not discredited by the Respondent, and no explanation for not incorporating that data into the IEP was provided as required.

- (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.

11. The Student's educational placement was changed in January 2011 when the IEP team, sans the Petitioner, changed the Student's specialized instruction from 20.5 hours per week outside of the general education setting to 13 hours outside that setting, and 13 hours in that setting, a net increase in specialized instruction. Despite the flawed IEP, the evidence does not show the educational placement was wrong. However, his absenteeism, despite being referenced in the IEP revision of April 2011, was never addressed. (Indeed, the Respondent has argued that the Student's absenteeism is the cause for any academic failure.) The Student's behavior was for the Respondent to address, and it failed to do so, thus denying the Student a FAPE because his functional goals should have included a goal to address behavior. This is not necessarily addressed by a change in placement, but rather additional related services and supplementary aids and services in the classroom.

12. 34 C.F.R. § 300.503(a)&(b) requires:

Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) *Content of notice.* The notice required under paragraph (a) of this section must include—

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the

procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

13. Parents are to be included as participants in IEP team meetings and the meetings are to be held at a mutually agreeable time and place. *See* 34 C.F.R. § 300.322.
14. There was no change in services for which the Petitioner was required notice in August 2010. Rather, as addressed supra, the Respondent failed to provide services in conformity with the Student's IEP for a time. No notice was provided prior to the IEP revisions of January 2011 or April 2011 went into effect. However, the evidence does not support a conclusion that these failures denied the Student a FAPE (FAPE was denied for other reasons) or significantly impeded the Petitioner's opportunity to participate in the decision-making process for the Student. The Respondent failed to conduct the IEP team meeting with the Parent in January 2011, despite rescheduling it for a mutually agreeable time. After the illegal January 2011 IEP team meeting, a new meeting was convened with the Petitioner in February 2011. No prior written notice was provided for the proposal made after the February 2011 IEP team meeting to do an assessment. Another meeting was held to discuss assessment results in April at which the Petitioner and her advocates participated. No evidence of the Petitioner not understanding what was being determined was provided, and the failure of the IEP team to develop appropriate IEPs was not the result of the lack of notice. Furthermore, no evidence was presented that the Petitioner sought a change in placement in February or April 2011 that was refused.
15. The Petitioner seeks compensatory education as a remedy in this case. 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. In this case, compensatory education is not warranted. The denials of FAPE have resulted in a lack of progress on addressing the Student's attendance. Had his attendance issues been properly addressed, he would have been in class more, and this failure cannot be retroactively corrected. His academic achievement does not appear to have significantly suffered as a result of this or the other denials of FAPE. His DC-CAS scores declined, but that was between 2009 and 2010. He has not been held back and has apparently achieved passing grades. His performance on the WJ-III is concerning, but not singularly determinative of his involvement and progress in the general education curriculum. To the extent that assessment accurately reflects the Student's academic achievement, ensuring the IEP meets the standards of the State Education Agency and IDEA will ensure he continues to make academic as well as functional progress.

17. The Petitioner also seeks a placement in a nonpublic special education school as a remedy.

When considering prospective nonpublic placement as a remedy, the following factors must be considered: a) the nature and severity of the Student's disability; b) the Student's specialized educational needs; c) the link between those needs and the services offered by the private school; d) the reasonableness of the placement's cost; and e) the extent to which the placement represents the least restrictive environment. Branham v. District of Columbia, 427 F. 3d 7, 12 (D.C. Cir. 2005). "Because placement decisions implicate equitable considerations, moreover, courts may also consider the parties' conduct." Id., citing Reid v. District of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005).

18. The student has both learning and emotional disabilities. These disabilities are not so severe that the Student is unable to function in the public school setting with appropriate services and supports, as evidenced by the progress he has made. The Petitioner has concerns about the Student's mental health needs. However, the Respondent's role is only to address the Student's disabilities so that he can be involved in and progress in the general education curriculum, not to treat or cure the Student's disabilities. The Respondent can address the Student's specialized needs and his IEP must be revised to ensure those needs are appropriately addressed. Only then will a placement determination be made, since the placement must be based, in part, on the IEP. If the IEP team determines the Student's needs can only be addressed by the non-public school, that may be an appropriate placement. It is not clear that the Respondent cannot meet the Student's needs in a public school. No evidence of the cost of the non-public school was provided. Finally, the record does not establish that a non-public special education school is the LRE for the Student. In fact, it is incumbent upon the Respondent to ensure the services and supports are available in a

mainstream setting, and more restrictive options utilized 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, not because the Respondent presently lacks the supports and services the Student requires. Thus, the prospective placement requested by the Petitioner must be denied, and the Student's placement will be in the LRE as determined appropriate by the IEP team once the IEP has been revised consistent with this determination.

## **VII. DECISION**

### **Issue #1**

The Student was denied a FAPE when special education and related services were not provided in conformity with his IEP during the fall of 2010.

### **Issue #2**

The Student was denied a FAPE when his IEP since January 2011 has not been reasonably calculated to enable him to be involved in and progress in the general education curriculum because it has not: always included an accurate statement of his present levels of academic achievement and functional performance; always included a statement of measurable annual goals designed to meet his needs and enable him to be involved in and progress in the general education curriculum; and has not always included appropriate and sufficient special education and related services and supplementary aids and services to enable the Student to advance appropriately toward attaining the annual goals.

### **Issue #3**

The Student's placement was appropriate, the failures of his IEP notwithstanding.

Issue #4

Prior written notice was not required in August 2010, and was not provided in January, February, or April 2011, when it was required. These procedural failures did not result in a denial of FAPE and did not significantly impede the Petitioner's opportunity to participate in the decision-making process concerning FAPE for the Student.

Issue #5

The Respondent failed to include the Petitioner at the January 2011 IEP team meeting after it had rescheduled the meeting for a mutually agreeable time. This procedural failure did not result in a denial of FAPE and did not significantly impede the Petitioner's opportunity to participate in the decision-making process concerning FAPE for the Student because a new meeting was convened in February 2011 and was attended by the Petitioner.

**VIII. ORDER**

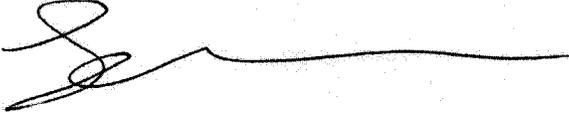
1. The Respondent will hold IEP properly constituted IEP team meetings at a mutually agreeable time and place with the Petitioner whenever she or a staff member requests to meet to review or revise the Student's IEP and for the purpose of meeting the requirements of this order within the timelines specified herein.
2. The Respondent will provide the Petitioner a written notice a reasonable time before the Respondent proposes or refuses to change the identification, evaluation, or educational placement of the Student or the provision of FAPE to the Student and will not permit a proposed change to take effect until a reasonable specified time following the notice.
3. The Student's IEP must be revised for the 2012-2013 school year consistent with this order.
  - a. The statement of present levels of academic achievement and functional performance must be revised to reflect how the Student's disabilities, both learning and emotional,

affect his involvement and progress in the general education curriculum. This statement must include academic achievement and functional performance data current as of May 2012, and must incorporate the most recent comprehensive assessment data as well.

- b. The statement of annual measurable functional goals must be revised to address the Student's current functional needs, as reflected in the statement of functional performance, particularly attendance.
  - c. The statement of special education and related services and supplementary aids and services must be revised to include those services listed in findings of fact 15 through 21 of this determination. Where those services are not specific, the IEP team must add specificity based on the current needs of the Student. The projected date for the beginning of the services, as well as the anticipated frequency, location, and duration of each service must also be stated, as required by 34 C.F.R. § 300.320(a)(7).
  - d. All other requirements of 34 C.F.R. § 300.320 must also be addressed in the IEP.
4. The Respondent must propose at least three dates and times to meet, not all consecutive, for the purpose of revising the IEP. 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. The meeting must occur no later than July 13, 2012.

**IT IS SO ORDERED.**

Date: June 5, 2012

  
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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).