

**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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STUDENT HEARING OFFICE  
2010 NOV 30 PM 3:37

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

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

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Date Issued: November 30, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: November 4, 2010

Room: 2006

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on November 4, 2010, in hearing room 2006, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is December 6, 2010, pursuant to 34 C.F.R. § 300.515(a). This HOD is issued on November 30, 2010.

The hearing in this matter was conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30. The hearing was closed to the public.

The complaint in this matter was filed on September 1, 2010, and was amended on September 22, 2010.<sup>2</sup> The Respondent filed a response to the first complaint on September 14,

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

2010, and a response to the amended complaint on October 5, 2010. Prehearing conferences were conducted on September 14, 2010, and October 6, 2010, and prehearing orders were issued on both of those days, following the prehearing conferences. A resolution meeting was held on September 14, 2010, and the matter was not resolved.

On October 21, 2010, the Petitioners filed a motion for partial summary judgment, with eight exhibits in support of their motion. The Respondent filed a reply to the motion on October 22, 2010, and an amended reply on October 26, 2010. The motion for partial summary judgment was granted, in part, in an order dated October 28, 2010. Hearing issues three and five were determined and it remained for hearing what remedy, if any, is appropriate to address the denials of free appropriate public education (FAPE).

The Petitioners are seeking compensatory education for the Student, placement at  
and an independent educational evaluation (IEE) consisting of a functional  
behavior assessment (FBA).

Present at the due process hearing were:<sup>3</sup>

Alana Hecht, Esq., Petitioner's Counsel

Blair Matsumoto, Esq., Respondent's Counsel

Petitioner A (Great Grandparent)

Petitioner B (Great Grandparent Advocate/Acting in place of the Parent)

Six witnesses testified at the hearing:

For Petitioner:

Petitioner B, (P)

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<sup>2</sup> "If a party files an amended due process complaint, the timelines for the resolution meeting in § 300.510(a) and the time period to resolve in § 300.510(b) begin again with the filing of the amended due process complaint." 34 C.F.R. § 300.508(d)(4).

<sup>3</sup> The Chief Hearing Officer also was present during the first hours of the hearing observing the process.

Ericka Miller, Educational Advocate (E.M.)

Dr. Natasha Nelson, Licensed Clinical Psychologist (expert witness on evaluating and treatment of children) (N.N.)

Carolyn Miskel, Educational Advocate (C.M.)

### Admissions

For Respondent:

Henrietta Bush-Sawyer, School Social Worker (H.B.)

28 documents were disclosed and offered by the Petitioner (P 1 – P 28). P 28 was objected to as it was not disclosed timely. It was permitted to be entered into the record as the IHO concluded there was no prejudice to the Respondent. The document was a curricula vitae of a disclosed witness. Petitioner's exhibits are:

P 1	October 27, 2010	Letter from Miller to DCPS
P 2	October 26, 2010	Letter from Talpsep to Hecht
P 3	Undated	Letter from P A to Morton
P 4	October 20, 2010	Classroom Observation
P 5	April 21, 2010	Individualized Education Program (IEP)
P 6	Undated	Draft behavior intervention plan (BIP)
P 7	October 11, 2009	Hearing Officer's Determination (HOD)
P 8	July 29, 2009	Due Process Complaint Notice
P 9	June 19, 2009	Confidential Cognitive, Educational, & Clinical Evaluation
P 10	Undated	Comprehensive Psychosocial Evaluation
P 11	Undated	Functional Behavior Assessment
P 12	August 28, 2009	Educational Evaluation
P 13	January 23, 2009	Psychological Evaluation Report
P 14	June 7, 2010	Letter from Hamm to P A
P 15	June 14, 2010	Fax cover from P B to Lillie M.
	June 17, 2010	Fax cover from P B to Lillie M.
P 16	2009-2010 SY	Discipline records
P 17	November 10, 2009	Multidisciplinary Team (MDT[IEP]) Meeting Notes
P 18	January 12, 2010	IEP team Meeting Notes
P 19	September 14, 2010	IEP team Meeting Notes
	September 14, 2010	Due Process Complaint Disposition
P 20	November 10, 2009	Advocate's Notes
P 21	November 10, 2009	Disability Worksheet
	Undated	Student Transportation Form
	June 3, 2009	IEP

P 22	January 7, 2009	IEP
P 23	November 20, 2009	Letter from Miskel to Young
P 24	November 16, 2009	Compensatory Education Plan
P 25	September 17, 2009	Letter from West to Crocker
P 26	July 27, 2009	Letter from West to Nyankori
P 27	March 2, 2009	Letter from West to Morton
P 28	Undated	Curricula Vitae of Dr. Natasha Nelson

23 documents were disclosed by the Respondent and 22 were offered. (R 1 – R 14 and R 16 -

R 23) There were no objections to any of the offered documents and all were entered into the record. Respondent's exhibits are:

R 1	October 5, 2010	District of Columbia Public Schools' Response to Parent's Amended Administrative Due Process Complaint Notice
R 2	October 21, 2010	District of Columbia Public Schools' Reply to Petitioner's Motion for Partial Summary Judgment
R 3	October 26, 2010	District of Columbia Public Schools' Amended Reply to Petitioner's Motion for Partial Summary Judgment
R 4	November 25, 2009	Letter of Invitation to a Meeting
R 5	February 21, 2010	Letter of Invitation to a Meeting
R 6	September 14, 2010	Letter of Invitation to a Meeting
R 7	June 3, 2009	IEP
R 8	April 21, 2010	IEP
R 9	November 10, 2009	IEP team Meeting Notes
R 10	January 12, 2010	IEP team Meeting Notes
R 11	April 22, 2010	IEP team Meeting Notes
R 12	September 14, 2010	Due Process Complaint Disposition
R 13	Undated	Compensatory Education
	November 6, 2009	Compensatory Education Plan
R 14	June 18, 2010	Report to Parents on Student Progress
R 16	October 24, 2010	Draft IEP Progress Report
R 17	October 5, 2010	Service Tracker
R 18	October 6, 2010	(behavior intervention plan)
R 19	November 10, 2009	(behavior intervention plan)
R 20	Undated	Draft (functional behavior assessment report)
R 21	Undated	Educational Evaluation
R 22	June 19, 2009	Confidential Cognitive, Educational, & Clinical Evaluation
R 23	Undated	Review of Independent Psychological Evaluation

## II. ISSUES

- 1) Whether the Respondent failed to comply with the Hearing Officer's Determination of October 11, 2009, when it did not timely revise the Student's individual education program (IEP), including a behavior intervention plan (BIP), and discuss an appropriate placement for the Student?
- 2) Whether the Respondent failed to provide or offer the Student and appropriate educational placement when it did not place the Student in a therapeutic setting in 2009?
- 3) What remedy, if any, is necessary to address the Respondent's failure to conduct a meeting to make a manifestation determination following a decision to change the Student's placement as a result of disciplinary removals of more than ten days during the 2009-2010 school year?
- 4) Whether the Respondent failed to conduct a functional behavioral assessment (FBA) requested on behalf of the Parent and determined necessary by the IEP team in January 2010?
- 5) What remedy, if any, is necessary to address the Respondent's failure to convene a properly constituted IEP team for the April 2010 IEP review when it did not invite the Parent, did not include a general education teacher, and did not include a related service provider of behavioral support and counseling?

### III. 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. The Student is a \_\_\_\_\_ year old learner with multiple disabilities.<sup>4</sup> He is currently in the \_\_\_\_\_ grade at \_\_\_\_\_
2. The Student exhibits the most significant learning problems in math and reading and has a stronger ability in writing.<sup>6</sup> The Student is currently performing below grade level academically, and has been doing so since at least fifth grade.<sup>7</sup> The Student's performance on reading advanced approximately one grade level from fifth grade to seventh grade (2<sup>nd</sup>-3<sup>rd</sup> grade level to 4<sup>th</sup> grade level).<sup>8</sup> The Student's performance in writing advanced approximately two grade levels from fifth grade to seventh grade (2<sup>nd</sup> grade level, with the exception of presenting ideas logically (9<sup>th</sup> grade level) to 4<sup>th</sup> grade level).<sup>9</sup> In math, the Student's performance declined at least a grade level from fifth grade to seventh grade (2<sup>nd</sup>-3<sup>rd</sup> grade level to 1<sup>st</sup> grade level).<sup>10</sup>
3. The Student is impulsive and displays limited self-control and acts out aggressively when frustrated.<sup>11</sup> His higher order thinking skills and problem solving skills are impaired, which impacts his behavior in the classroom setting where he is avoidant and engages in disruptive behavior, does not participate or complete assigned work, and is non-compliant with rules.<sup>12</sup>

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<sup>4</sup> P 9/R 22.

<sup>5</sup> Undisputed fact (UF), R 16.

<sup>6</sup> P 9/R 22, R 20.

<sup>7</sup> R 20, P 9.

<sup>8</sup> R 20, P 9.

<sup>9</sup> R 20, P 9.

<sup>10</sup> R 20, P 9.

<sup>11</sup> P 9/R 22, R 20.

<sup>12</sup> P 9/R 22, R 20.

4. An HOD was issued following a due process hearing involving the parties on October 11, 2009.<sup>13</sup> The HOD required the Respondent to convene “an appropriate IEP team” for a meeting on one of three possible dates.<sup>14</sup> At the IEP team meeting, the HOD required:<sup>15</sup>

... the team shall review Student’s July 2009 independent psychological evaluation [P 9/R 22], revise Student’s IEP, update Student’s BIP, and discuss an appropriate placement for Student.

5. The IEP team meeting was convened on November 10, 2009.<sup>16</sup> The evaluation was reviewed and no disagreements with the results were recorded.<sup>17</sup> The IEP was not revised.<sup>18</sup> The IEP team discussed the Student’s disability classification under IDEA and revised the BIP to remove “extra time” from it.<sup>19</sup> The meeting was ended prematurely as a result of a fire alarm.<sup>20</sup>

6. The meeting was reconvened on January 12, 2010.<sup>21</sup> The IEP was not revised.<sup>22</sup> The team did discuss C.M.’s request that a new FBA be conducted and this was agreed to.<sup>23</sup>

7. The IEP was finally revised in April, 2010, at a meeting the Petitioners were not invited to.<sup>24</sup> The revised IEP does not include any recommendations from the independent psychological assessment, and there is no written notice explaining the proposals in the IEP or anything that may have been refused.<sup>25</sup> The April 21, 2010, IEP is largely

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<sup>13</sup> P 7.

<sup>14</sup> P 7.

<sup>15</sup> P 7.

<sup>16</sup> Testimony (T) of C.M., P 17/R 9, P 20.

<sup>17</sup> P 17/R 9, P 20, R 23.

<sup>18</sup> T of C.M., P 17/R 9, P 20.

<sup>19</sup> T of C.M., P 17/R 9, P 20, R 19.

<sup>20</sup> T of C.M., P 17/R 9, P 20.

<sup>21</sup> T of C.M., P 18/R 10.

<sup>22</sup> T of C.M., P 18/R 10.

<sup>23</sup> UF, T of C.M., P 18/R 10.

<sup>24</sup> There was an IEP in the record from June 2009 (P 21/R 7) and the next was from April 21, 2010 (P 5/R 8).

Likewise, as determined as part of the summary judgment determination, there is no evidence to dispute the Petitioners claims they knew nothing of the April 2010 IEP team meeting, such as a Letter of Invitation. Letters of Invitation exist for other meetings.

<sup>25</sup> P 5/R 8. Because the prior written notice (the key evidence regarding any proposal or refusal by the local education agency) is not in the record, it is presumed to not exist.

unintelligible because the statement of present levels of academic achievement and functional performance do not fully explain how the Student's disabilities impact his involvement and progress in the general education curriculum (although it does state the grade level a recent assessment showed he is performing at in reading and math and writing) and the academic goals do not clearly relate to the aforementioned statement(s).<sup>26</sup>

8. The Student received all Cs in his classes the first two advisories of the 2009-2010 school year.<sup>27</sup> The Student received Fs for the last two advisories, except for a class called "Computer Applications."<sup>28</sup> The Student often missed school or was often removed from class or school during the 2009-2010 school year.<sup>29</sup>
9. The evaluation of the Student conducted in June, 2009, includes nine recommendations.<sup>30</sup> The second recommendation, that was never rejected nor contraindicated by any other assessment data, states:<sup>31</sup>

Given that [Student] continues to demonstrate academic challenges despite intervention, he will require placement in a full time structured program that emphasizes behavioral expectations while reinforcing strong academic skills. The teacher pupil ratio in the program should be small and he must have access to crisis and therapeutic supports when he is need [sic]. [Emphasis in original.]

10. An FBA was completed and a draft report written sometime after the start of the 2010-2011 school year.<sup>32</sup> A draft BIP was written based on the draft FBA report.<sup>33</sup>
11. The Petitioners, through Counsel's office, submitted a plan for compensatory education for the Student on or about October 27, 2010.<sup>34</sup> The plan lists alleged violations the

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<sup>26</sup> P 5/R 8.

<sup>27</sup> R 14.

<sup>28</sup> R 14.

<sup>29</sup> T of P.

<sup>30</sup> P 9/R 22.

<sup>31</sup> P 9/R 22, R 23, P 10, P 12/R 21, P 13, P 17/R 9.

<sup>32</sup> R 20, T of H.B.

<sup>33</sup> R 19, T of H.B.

Respondent committed, hours of various educational services the Student allegedly missed as a result, and a recommended plan for compensatory education consisting of: six hours per week for one full year of tutorial services; one hour per week for one full year of behavioral support/counseling; and placement in a full-time therapeutic day program of the parent's choice.<sup>35</sup> The creator of the plan, E.M., was unable to articulate (and did not specify in the plan) why or how the recommended compensatory education would put the Student in the place he would have been but for the alleged denials of FAPE.<sup>36</sup>

12. The Student has been admitted to \_\_\_\_\_ in Washington, D.C., a private full-time therapeutic special education school for students with learning and behavioral disabilities.<sup>37</sup> His admission was based on review of his educational records.<sup>38</sup>

\_\_\_\_\_ provides services year-round, and uses a "whole child" approach to educating children with disabilities in a consistently structured intense therapeutic setting.<sup>39</sup> The school has a six to one student/teacher ration to aid with proximity control of students.<sup>40</sup> Related services are provided across various settings in the school, including in the classroom and in Therapist's offices.<sup>41</sup>

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<sup>34</sup> P 1.

<sup>35</sup> P 1.

<sup>36</sup> P 1, T of E.M. (The witness testified that she did not do an hour for hour calculation, but stated her calculation was based, in part, on services the Student had "missed." When asked about this further, the witness testified that she didn't know if the Student received certain services or not.)

<sup>37</sup> P 2, T of M.S.

<sup>38</sup> P 2, T of M.S.

<sup>39</sup> T of M.S.

<sup>40</sup> T of M.S.

<sup>41</sup> T of M.S.

#### IV. 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. "A decision made in a hearing conducted pursuant to §§ 300.507 through 300.513. . . is final, except that any party involved in the hearing may appeal the decision. . . ." 34 C.F.R. § 300.514(a). The HOD of October 11, 2009, was not appealed by either party and is final.
2. The Respondent failed to implement the order for the October 11, 2009, HOD requiring it to revise the Student's IEP following review of the independent psychological assessment. While the assessment was reviewed in November 2009, the team failed to reject any of the assessment results of recommendations and did not incorporate the recommendations into the IEP. When the meeting had to twice be reconvened the assessment results were still not reflected in the IEP. While an IEP is not required to incorporate any specific assessment results, an IEP must be based on something (it cannot be arbitrary), and parents must be provided notice of what that is. *See*, 34 C.F.R. § 300.503. In this case, other than some new testing that was done subsequent to the October 2009 HOD, the content of the IEP lacked any basis in data, was internally inconsistent, and was not revised in compliance with the HOD.
3. The BIP was reviewed and revised. The Petitioners', through the Student's Educational Advocate, later wanted additional changes. The fact that additional changes were sought, and may not have been made, does not negate the changes that were made pursuant to the October 2009 HOD in the first place.<sup>42</sup>

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<sup>42</sup> A "behavior intervention plan" or "BIP" is a term of art describing the portion(s) of the IEP that address a student's behavior needs resulting from his or her disability. The BIP may include goals, special education and

4. 34 C.F.R. § 300.17 provides:

- Free appropriate public education or FAPE means 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.

5. Because the order of the HOD was not followed, the special education and related services provided to the Student did not meet the standards of the SEA and were not provided in conformity with an IEP that met the requirements of §§ 300.320 through 300.324.
6. The IEP team, which develops, reviews, and revises the IEP must include a person knowledgeable about the instructional implications of assessment results. 34 C.F.R. § 300.321. The placement decision must be made at least annually and must be based on the IEP. 34 C.F.R. § 300.116. All decisions regarding the identification, evaluation, or educational placement of the child or the provision of FAPE to the child must be made based on data. 34 C.F.R. § 300.503(b)(3).
7. In this case, the only data at the IEP team's disposal was assessment data that recommended a full time structured program that emphasizes behavioral expectations while reinforcing strong academic skills and where the teacher pupil ratio in the program would be small and he must have access to crisis and therapeutic supports when the Student required it. There was no evidence presented challenging this recommendation from the assessment report. In fact, the underlying data in the assessment report upon

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related services, supplementary aids and services, program modifications or supports for school personnel, and any other IEP components determined necessary by the IEP team to address a student's behavior needs resulting from his or her disability. A BIP need not be specifically designated such as there is no federal or local law requiring such. (See, e.g., 34 C.F.R. § 300.320(d) "Nothing in this section shall be construed to require — (1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or (2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.")

which this recommendation was based was determined to be valid by the Respondent.

Thus, there was no basis to not follow the recommendation.

8. The Student's educational performance did not advance rapidly enough from fifth grade to seventh grade to close the achievement gap between where he is performing and the expected performance for his grade level. In fact, in mathematics the Student's performance regressed. This demonstrates educational harm that has reasonably been the result of any or all of the violations described herein and in the motion decision of October 28, 2010.
9. Given the drop in grades from Cs to Fs during the second half of the 2009-2010 school year, and because the Student had been exhibiting disruptive behaviors that resulted in his not accessing the general curriculum, and because the IEP review was still underway following the January 2010 IEP team meeting, the FBA should have been conducted fairly quickly, perhaps within a week or two (and another IEP team meeting then held). This did not happen and the Student's grades suffered as a result, demonstrating a denial of a FAPE. Given that an FBA was recently conducted, a new one is not warranted at this time.
10. Given the educational harm the Student has suffered as a result of the violations herein, the Student's placement at \_\_\_\_\_ (or similar school) until he is brought up to grade level in academic performance is appropriate. The remaining compensatory education plan presented by the Petitioner lacks sufficient coherence or explanation to show why it is necessary to aid the Student in reaching the level he would have reached academically but for the violations. The placement at \_\_\_\_\_ a year-round school with a structured environment, a low student to teacher ratio, and redundant access to therapy

services is appropriate to help the Student move academically to where he should be in the general education curriculum.

#### **V. ORDER**

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

1. The Student will be placed at, and transported to, \_\_\_\_\_ at public expense, at least until the conclusion of the 2011-2012 school year. At that time the IEP team must review the IEP, the Student's performance, and educational placement, and determine whether the IEP and placement are enabling the Student to close the achievement gap between his then current academic performance and the expected grade-level performance at his then-grade level. Any dispute occurring at that time over a proposed or refused IEP or placement will be subject to dispute resolution mechanisms, including a due process hearing.
2. The Student's placement will be effective as soon as possible but not later than the first day of school in calendar year 2011.
3. If or when \_\_\_\_\_ will no longer enroll the Student during the timeframe herein, the IEP team must determine a new placement, public or private, that is a full-time therapeutic special education school with a student/teacher ration of less than ten to one, and that has available related services required by the Student to be involved in and progress in the general education curriculum. If this occurs prior to the end of the 2011-2012 school year, and there is a dispute as to the new placement, this order may be enforced through the SEA complaint mechanism at 34 C.F.R. §§ 300.151-153.

**IT IS SO ORDERED.**

Date: November 30, 2010

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

\_\_\_\_\_  
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).