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

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: December 29, 2011

Hearing Officer: Jim Mortenson

OSSE
STUDENT HEARING OFFICE
2011 DEC 29 PM 3:03

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on October 17, 2011.

A response to the complaint was filed on October 18, 2011, and a supplemental response was filed October 31, 2011, pursuant to the prehearing order. A resolution meeting was held on October 21, 2011, and the parties agreed no resolution could occur and the 45 day hearing timeline began on October 22, 2011.

The prehearing conference was held on October 26, 2011 and a prehearing order was issued on that date. The hearing was scheduled for November 23, 2011, and the parties agreed they would prefer a different date outside of the 45 day hearing timeline. A joint motion for a

[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

continuance was subsequently filed on October 27. 2011, and the Chief Hearing Officer granted the motion rescheduling the hearing to December 19, 2011, and the Hearing Officer Determination (HOD) due date to December 29, 2011.

The due process hearing was convened and held on December 19, 2011, in room 2007 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is December 29, 2011. This HOD is issued on December 29, 2011.

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. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (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 individual education program (IEP) from the start of the 2011-2012 school year until at least October 4, 2011?

(2) Whether the Respondent denied the Student a FAPE when it failed to determine an evaluation of the Student was necessary, and complete such evaluation, following his transfer to the Respondent from another State?

(3) Whether the Respondent denied the Student a FAPE when it proposed an IEP for the Student on October 4, 2011, that is not reasonably calculated to provide educational benefit because it lacks: a) an accurate statement of the Student's present levels of academic achievement and functional performance including how his disability affects his involvement and progress in the general education curriculum; b) an appropriate statement of measurable annual academic and functional goals designed to meet his needs that result from his disability to enable him to be involved in and make progress in the general education curriculum; c) an appropriate statement of the supplementary aids and services to

be provided that will enable him to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum; and d) extended school year (ESY) services?

(4) Whether the Respondent denied the Student a FAPE when it failed to place him in the least restrictive environment (LRE)?

The substantive requested relief at the time of hearing is:

(1) Independent comprehensive psychological and vocational level II assessments;

(2) An IEP team meeting within 10 days of the completion of the requested assessments to review and revise the Student's IEP;

(3) Compensatory education (or strictly prospective placement) consisting of placement in a non-public full-time segregated day school, specifically Accotink Academy, and services recommended by the Petitioner's Educational Advocate, which included 100 hours of independent tutoring in all areas and 10 hours of independent counseling.

The Respondent failed to provide the Student with special education and related services in conformity with his IEP since the start of the 2011-2012 school year because his IEP required services in a self-contained setting or outside of the general education setting and the services were provided in the general education setting. The Respondent did not deny the Student a FAPE when he was not reevaluated. The Respondent denied the Student a FAPE when it failed to propose and provide an IEP that was reasonably calculated to provide educational benefit because the IEP lacks statements of the Student's present levels of academic achievement and functional performance, an appropriate statement of measurable annual functional goals designed to meet his needs that result from his disability to enable him to be involved in and make progress in the general education curriculum and an appropriate statement of the special education and related services and supplementary aids and services to be provided that will enable him to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum. The Respondent did not deny the Student a

FAPE even though it failed to place him based on his IEP when it placed him in an "inclusion" classroom rather than in segregated classrooms because the Student was involved in and progressing in the general education curriculum.

IV. EVIDENCE

Seven witnesses testified at the hearing, three for the Petitioner and four for the Respondent. The Petitioner's witnesses were:

1) Dr. Ida Jean Holman, Educational Advocate (I.H.)[2]
2) The Student's Mother, Petitioner (P)
3) Admissions Director,

The Respondent's witnesses were:

1) Lee Barry, Special Education Coordinator (L.B.)
2) Special Education Teacher
3) English Teacher
4) Dr. David Cranford, Clinical Director (D.C.)[3]

Nine exhibits were admitted into evidence of 15 disclosures from the Petitioner. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 7	November 30, 2010	IEP
P 8	October 4, 2011	IEP
P 9	October 20, 2010	Psychoeducational Report

[2] The parties stipulated I.H. is an expert in the field of special education. However, her opinions about special education programming for the Student can only be given limited weight since I.H. was not thoroughly familiar with the Student or his educational records, she performed no current assessments of the Student and the assessment data she reviewed and upon which she based her opinions were not current.

[3] D.C. is an expert in psychology and special education programming due to his training and experience. However, D.C. lacked sufficient firsthand knowledge about the Student and his needs to give his opinions about programming for the Student much weight. His opinions were based only on a review of educational records that did not appear to be complete based on inquiries about his opinions about the Student's programming. Furthermore, D.C. had not observed the Student nor did he complete any assessments of the Student.

P 10	November 30, 2010	Functional Behavioral Assessment
P 11	December 8, 2010	Short-Term Pattern of Suspension
	December 13, 2010	Notes and Incidents
P 12	Undated	Behavior Incidents for [Student] – Ninth Grade
P 13	October 7, 2011	Request for records for [Student]
P 14	November 10, 2011	Letter from Corley to [Petitioner]
P 15	Undated	Resume Ida Jean Holman, Ph.D.

Five exhibits of 17 of the Respondent's disclosed exhibits were admitted into evidence. The Respondent's exhibits are:

Ex. No.	Date	Document
R 9	December 6, 2011	Progress Report for [Student] – Ninth grade
R 11	Undated	Grade Card for [Student] – Ninth grade
R 12	October 24, 2011	Coordinate Plane
	Undated	Chapter [1] Test
	Undated	Integers
	Undated	Order of Operations
	Undated	Elapsed Time
	Undated	Integers
	Undated	Integers
	Undated	Order of Operations
	November 7, 2011	Elapsed Time
R 13	August 17, 2011	Pretest – Reading
	August 23, 2011	Assignment (English 1, 3 period)
	August 25, 2011	[Untitled assignment]
	Undated	Reciprocal Teaching Worksheet
	September 2, 2011	Subject English Period 3
R 16	Undated	Curricula Vitae of David Cranford, Ph.D.

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 with a disability.[4] The Student has been determined eligible for special education and related services under the definition of emotional disturbance (ED) and suffers from attention deficit hyperactivity disorder (ADHD).[5]
2. The Student attended the Respondent's school in Washington, D.C. before he moved to North Carolina for the 2010-2011 school year.[6] He moved back to Washington, D.C. in the summer of 2011 and his mother re-enrolled him at the Respondent's school.[7] He is currently repeating the grade.[8]
3. The Student functions in the low average range intellectually.[9] In the fall of 2010 he was functioning within the borderline range in broad math skills and very low range in broad reading and broad written language skills.[10] He does not always complete or turn in class assignments and often scores very well when he does.[11] He exhibits typical to mild/moderate behavioral-emotional problems, including acting out, using profanity in class, non-compliance, cutting class, behaviors that detract from learning, and difficulty adapting to situational demands.[12] When the Student is in transitional areas and/or around peers in class that are having issues he can begin instigating a build up of problems by acting out or doing the exact thing the other student has been called on and/or encouraging the student to

---

[4] Testimony (T) of P ,P 7, P 9.
[5] T of P, P 7.
[6] T of P, T of S.G., P 9.
[7] T of P, P 8.
[8] P 7, P 8, T of P.
[9] P 9.
[10] P 9.
[11] R 9.
[12] P 9, P 12.

continue misbehaving where he can gain attention and "look cool to fit in."[13] He can be verbally disrespectful towards adults at school and will shut down or refuse to comply when redirected.[14]

4. In the fall of 2010, an evaluator recommended the following for the Student's IEP:[15]

    1. [Student] could continue to benefit from individualized academic and behavior planning.
    2. [Student] will tend to be a slow learner who needs much repetition and opportunity for practice to learn new skills. Directions should be simple and concrete, employing visual cues whenever possible.
    3. [Student's] teacher should repeat a new concept in a variety of ways to provide ample opportunity for him to generalize and internalize the new material.
    4. Repeat and simplify directions, using cues, prompts, or models to elicit correct responses.
    5. [Student] should be given frequent feedback on his performance because he will most likely perform at a higher level under these conditions. Initially, feedback should be relatively continuous and gradually reduced to intermittent. Finally, the feedback should be based on his finishing a task (product completion).
    6. Teach (Student) to use a problem-solving approach to behavioral situations. The steps involve his determining what he should be doing, looking at all the possibilities, choosing the strategy or behavior, and evaluating the outcome. Concrete examples should be used to teach the approach (e.g., [Student] is completing a task assignment and another student begins talking to him).
    7. When extra self control may be needed, tell [Student] about the situation in advance and rehearse the behaviors needed or practiced needed skills in advance.

5. When the Student returned to Respondent's school he had an IEP from his school in North Carolina.[16] The IEP had one annual goal for the Student: "[To] control his behavior in an appropriate manner on 4 of 5 times in all school locations."[17]

6. The special education to be provided to the Student to aid him in reaching his annual goal was special education in a self-contained classroom for ten 90 minutes sessions per week. Other than those services, some accommodations in district or state-wide testing were provided as well as a behavior intervention plan (BIP).[18] The BIP was designed to assist the Student in controlling his behaviors and included the provision of a warning prompt, an

[13] P 10.
[14] P 10, P 12.
[15] P 9.
[16] T of P, T of L.B., P 7.
[17] P 7.
[18] P 7.

immediate call home, and a several minute cool down period.[19] Positive reinforcements included a classroom fun time/break, movement up the class level system, and contact with home/praise.[20] Consequences included a verbal warning, a referral, in-school suspension, and out-of-school suspension.[21] By May 2011, the only changes to the BIP were to provide one to one support.[22]

7. The IEP included post-secondary goals and transition services.[23]
8. When the Student began attending the Respondent's school for the 2011-2012 school year, the Student was placed in all "inclusion" classes in which a small number of students were taught by a regular education teacher and a special education teacher.[24] All of the students in the Student's math and English classes have IEPs, however.[25] The BIP was not implemented.[26]
9. The Respondent had the Student's evaluation data from 2010 in its possession.[27]
10. The IEP was revised on October 4, 2011.[28] The revised IEP lacked statements of the Student's present levels of academic achievement and functional performance, as the IEP relied on assessment data one year old, did not address his functional skills, and did not describe how his disability affects his involvement and progress in the general education curriculum (e.g. that the Student's ADHD has resulted in specific deficits in specific academic skills).[29] Rather, the IEP states, for example, that he had a deficit in math

[19] P 7.
[20] P 7.
[21] P 7.
[22] P 7.
[23] P 7.
[24] T of D.C., T of P., T of S.G., T of H.J.
[25] T of S.G., To of H.J.
[26] T of D.C.
[27] T of D.C.
[28] T of P, P 8.
[29] P 8.

calculation as of August 2010, which "negatively impacts his academic performance and the ability for him to access the curriculum."[30]

11. The revised IEP includes the following three annual goals: 1) "[Student] will appropriately respond to the Math teacher request 4 out of 5 trials[;]" 2) "[Student] will complete all task/assignments within the given time limit 4 out of 5 times without any disruptions[;]" and 3) "[Student] will display appropriate behavior in Written Language and speak with teacher appropriately."[31] These goals were all listed under academic areas (mathematics, reading, and written expression, respectively) and not as functional goals.[32]
12. The special education and related services to aid the Student in reaching these goals included specialized instruction outside of the general education setting for 27 hours per week because the Student required behavioral support in the academic setting, and behavioral support services outside of the general education setting for 30 minutes per week because the Student required one on one counseling.[33] One of the Student's teachers who participated in the IEP team meeting, one of his regular education teachers, and the Clinical Director of the school do not believe the Student requires services in a segregated classroom because his behaviors are not as severe as many of his peers.[34]
13. The revised IEP included no post-secondary goals or transition services despite being the IEP that is expected to be in effect when the Student turns 16 years of age in July 1996.[35]

---

[30] P 8. (There were statements concerning math, reading, and written expression that were written this way.)
[31] P 8.
[32] P 8.
[33] P 8.
[34] T of D.C, T of S.G., T of H.J.
[35] P 8. (The IEP includes the includes the incorrect year of the Student's birth (1998 rather than 1996). It is also not clear what the anticipated duration of the services is. The IEP says October 22, 2011. D.C. testified that this is an error. However, it is not clear what the correct date should be, since October 22, 2012, is more than a year from the anticipated start date of the IEP which is listed as October 4, 2011. The end date could be the end of the 2011-2012 school year, but since the IEP states October, this IHO finds that October 2012 is when the IEP was expected to be revised when it was last revised on October 4, 2011.)

14. The Petitioner signed the IEP and indicated she agreed with the revision.[36] She never requested a reevaluation of the Student and a reevaluation has not been conducted by the Respondent since he returned from North Carolina.[37]

15. The Student is currently at the second or third grade reading level despite passing grades in English class.[38] The regular education English Teacher is working on goals for the Student that were not developed utilizing due process procedures (an IEP team meeting and written notice to the Parent) and are not part of the Student's IEP.[39] The Student' skill deficits in reading are in fluency and comprehension, but the evidence in the record does not show whether these deficits are the result of a disability or not.[40]

16. The Student earned all passing grades at the conclusion of the first advisory for the current school year.[41] The Student earned passing grades in all classes in the second advisory for the current school year, except for failing Algebra.[42] He received an A in Algebra the first advisory and during the second advisory he was assessed twice, first scoring 100% (A) and later scoring 17% (F).[43] The Student is demonstrating he can perform ninth grade mathematics and currently has no academic skill deficits in math.[44]

---

[36] P 8.
[37] T of P. (The Petitioner testified that she requested a reevaluation. This testimony is not credible because the Petitioner signed the IEP on October 4, 2011, and she could provide no details about her alleged request for an evaluation she said occurred in October after she had already agreed to the IEP.)
[38] T of H.J, R 9, R 11.
[39] T of H.J.
[40] T of H.J., P 7, P 8, P 9, P 10, P 11, P 12, R 9, R 11, R 13.
[41] R 9, R 11.
[42] R 9.
[43] R 9, R 11.
[44] T of S.G.

17. The Petitioner seeks to have the Student placed at which is a therapeutic day school only for children with disabilities.[45] The base tuition at the school is to per year.[46]

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. 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. 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

[45] T of J.C., T of P.
[46] T of J.C.

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.

3. The IDEA "is violated when a school district deviates *materially* from a student's IEP." Wilson v. D.C., 770 F.Supp. 2d 270, ___ , 56 IDELR 125, ___ (p 7 of C.A. 09-02424) (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 p 7 (emphasis in original), *citing*: Van Duyn, 502 F.3d at 822 (emphasis added); cf. MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). "Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." Id., *See, e.g.*, Van Duyn, 502 F.3d at 822; S.S., 585 F. Supp. 2d at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

4. The Student came to the Respondent's school with an IEP from his prior State and school. That IEP required the Student to be provided specialized instruction for 15 hours per week in a self-contained classroom (outside of the general education setting - ten 90 minute sessions per week) due to behavioral needs. The Student's English and Math classes were not self-contained classes, but included only students with IEPs, although it is not known what the needs of the other students are. The IEP was revised on October 4, 2011 at the Respondent's school and the amount of specialized instruction outside of the general education setting was increased to 27 hours per week. The Respondent still did not provide any specialized instruction outside of the general education setting, instead providing all specialized instruction in the "inclusion" setting. The English Teacher created her own reading goals for the Student rather than utilize due process procedures and including them in the IEP. This could be because the Student's reading deficits (he is reading at no more than a third grade level) are not the result of a disability but rather the result of inappropriate reading instruction over the years. The evidence in the record is not clear enough to determine that. Even if the Student's reading deficits are directly or indirectly the result of a disability, such deficit is not the result of the Respondent's failure to implement the IEP because it is such a large gap from where he is currently expected to be performing that it must have occurred over years. The Student is currently failing his math class because of extremely poor performance on one quiz, which may or may not be an impact of the Student's disability and the Respondent's failure to implement the IEP. Because it is not required that the Student suffer demonstrable educational harm in order to prevail on a claim that the IEP was not implemented, the Student prevails on this issue.

5. Federal regulations at 34 C.F.R. § 300.303 provide:[47]

> (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311 —
> (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
> (2) If the child's parent or teacher requests a reevaluation.
> (b) Limitation. A reevaluation conducted under paragraph (a) of this section —
> (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
> (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

6. There was no request from the Parent or a teacher for a reevaluation of the Student. Furthermore, the last evaluation of the Student occurred only a year prior, 2010, when the Student was in another State and the Respondent had the prior evaluation data. There is no clear evidence in the record showing the Student's skill deficits in reading are the direct or indirect result of a disability. The IEP team will have to consider, based on a thorough review of all of the Student's educational records, whether there is sufficient data to determine that question and, if not, propose a reevaluation of the Student in order for the IEP team to answer it.

7. 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

[47] In her complaint the Petitioner referenced 34 C.F.R. § 300.323(f), concerning the provision of FAPE to students who transfer from other states. That provision is not applicable because it only applies to students transferring during the same school year and in this case the Student transferred over the summer. This does not mean the Respondent was not responsible for providing FAPE, however, because the Student had been attending the Respondent's school and was in the other State for only one school year, so the Respondent was familiar with the Student. T of S.G.

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.

8. When the IEP team revised the IEP in October 2011, the Respondent did not ensure the IEP included a statement of the Student's present levels of academic achievement and functional performance, including how the Student's disability affects his involvement and progress in the general education curriculum. The purported statements of present levels of performance are based on data that was a year old, and only addressed academic achievement, although not specifically, and did not address the Student's functional performance, his primary issue. Two teachers testified, one saying the Student had no academic skill deficits in math, and one saying the Student's reading comprehension and fluency skills are at no more than a third grade level. This information is not reflected in the IEP. Thus, the rest of the IEP which is built upon the outdated information could not possibly be appropriate. Furthermore, the goals addressed functional performance even though they were listed as academic goals.

Information presented at hearing showed the Student's academics may only be indirectly affected by his disability, and so he may need no academic goals to address skill deficits in academics, but rather only functional goals to address his behavioral needs to help him be available for learning. Again, it is not clear whether his reading skills are deficient due to his identified disability (ADHD), an unidentified disability, or a lack of appropriate instruction in reading. He does otherwise demonstrate progress in the general education curriculum when he attends class, is compliant, and completes work. Finally, the evidence shows that the Student does not require specialized instruction outside of the general education setting. He was getting such instruction in the general education (inclusion) setting (even though that was not in his IEP) and was doing well academically (but for reading) and behaviorally. The behavioral problems he exhibited only marginally affected his academic output and did not result in his not being involved in and progressing in the general education curriculum, his current failing grade in Algebra notwithstanding. The Petitioner did not persuade this IHO that his current failing grade in that class was due to any failure on the part of the Respondent and even if it was, one failing grade is not necessarily a denial of FAPE. Furthermore, the Petitioner did not persuade this IHO that the Student's reading performance is the result of a disability, and even if it is his current performance cannot be attributed to the failure of the Respondent to implement the IEP since the deficit is so large and must have been getting larger over a long period of time. The Student is making relative progress during the present school year.

9. ESY services must be provided when determined necessary to provide FAPE. 34 C.F.R. § 300.106. Given the Student's performance, there is no indication ESY services are necessary. Furthermore, there was no evidence presented that there was a disagreement at the IEP team

meeting over ESY services. If it is later determined the Student's reading performance is the result of a disability, ESY services may be necessary to ensure the Student has the opportunity to close the gap between his performance level and the level expected of a child in his grade, thus ensuring his opportunity to be involved in and make progress in the general curriculum and therefore provided a FAPE.

10. Placement determinations must be based, in part, on a child's IEP and, unless the IEP requires some other arrangement, a child with a disability is to be educated in the school she would attend if not disabled. *See* 34 C.F.R. § 300.116 (b) & (c).

11. The Student's placement in an inclusion classroom was not based on the Student's IEP, and the Student was not pulled out prior to October 4, 2011, as required by his previous IEP, for 15 hours per week. However, since a denial of FAPE must be based on substantive grounds, and the Student is progressing in and is involved in the general education curriculum (but for reading), there is no denial of FAPE as a result of the Respondent's placement of the Student. In fact, the Student's IEP will be revised and placement in regular education classes with supplementary aids and services will be consistent with it.

12. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). 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, ___, 44 IDELR 149, ___ (pdf pg. 5) (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, 43 IDELR 32, ___ (D.C. Cir. 2005).

13. Nonpublic placement in a segregated day school for students with disabilities is not appropriate for this Student because his ADHD is not so severe that he cannot function in a regular education classroom with supplementary aids and services and has demonstrated he can progress in the general education curriculum in such an environment even with the lack of an appropriate IEP .

14. Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel, Reid v. District of Columbia, 401 F.3rd 516, ___, 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).

15. Compensatory education is not warranted in this case because the Student is involved in and progressing in the general education curriculum. It has not been established that his deficits in reading comprehension and fluency are the result of a disability.

16. The appropriate remedy in this case is a revised IEP that includes all of the required components pursuant to 34 C.F.R. § 300.320, including, but not limited to, postsecondary goals and transition services. The Student will then be placed in the least restrictive environment in accordance with the revised IEP. The IEP team must review all available assessment data and make a determination whether additional data are necessary regarding the Student's reading deficits and, if so, propose a reevaluation to gather than data.

VII. DECISON

Issue 1: The Petitioner prevails because the Respondent failed to provide the Student with special education and related services in conformity with his IEP since the start of the 2011-2012 school year.

Issue 2: The Respondent prevails because it did not deny the Student a FAPE when he was not reevaluated.

Issue 3: The Petitioner prevails because the Respondent denied the Student a FAPE when it failed to propose and provide an IEP that was reasonably calculated to provide educational benefit because the IEP lacks statements of the Student's present levels of academic achievement and functional performance, an appropriate statement of measurable annual functional goals designed to meet his needs that result from his disability to enable him to be involved in and make progress in the general education curriculum and an appropriate statement of the special education and related services and supplementary aids and services to be provided that will

enable him to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum.

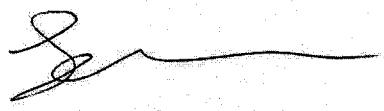
Issue 4: The Respondent did not deny the Student a FAPE even though it failed to place him based on his IEP when it placed him in an "inclusion" classroom rather than in segregated classrooms.

VIII. ORDER

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

1. The IEP team will meet and revise the Student's IEP consistent with the findings of fact, conclusions, and this order of this HOD, as well as the requirements of 34 C.F.R. § 300.320(a) & (b).
2. The IEP team will meet to revise the IEP no later than January 17, 2012.
3. The Respondent will offer the Petitioner three alternative dates and times to meet and will advise the Petitioner of the date and time the meeting will occur if she declines to chose one of the proposed dates and times.
4. The IEP team will consider, based on all available assessment data, whether the Student's reading deficits are the result of a disability and, if it cannot make this determination, propose a reevaluation to collect data to accurately answer the question.
5. The IEP team will determine and propose the Student's placement based on the IEP.
6. The revised IEP and placement will include services that will go into effect January 30, 2012.
7. The proposed IEP and any proposal or refusal to reevaluate the Student will be accompanied by a written notice that meets the requirements of 34 C.F.R. § 300.503.

IT IS SO ORDERED.



Date: December 29, 2011

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).