# DC Office of the State Superintendent of Education

Office of Review & Compliance
Student Hearing Office
1150 5th Street, S.E.
Washington, D.C. 20003

**CONFIDENTIAL**

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STUDENT HEARING OFFICE
2012 DEC -4 AM 9:41

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| STUDENT[1], by and through Student's Parent<br><br>Petitioners,<br><br>v.<br><br>DCPS<br><br>Respondent. | HEARING OFFICER'S DETERMINATION<br><br>Impartial Hearing Officer:<br><br>Joseph Selbka |

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. Introduction and Procedural Background

Student's intellectual disabilities have resulted in him being on a vocational track as opposed to a diploma track for his education (Compensatory Education Consultant Testimony, Independent Tutor Testimony, Educational Advocate Testimony). Student also has disabilities related to his vision. *Id.*

2. The circumstances which prompted this hearing were a claim that the District inappropriately exited Student from special education; failed to provide services when Student wished to receive said services; failed to design an appropriate IEP in March, 2011 in that the goals in Student's most recent IEP were inappropriate; and that the March, 2011, IEP was not implemented appropriately.

3. The parties agree that the complaint was filed on September 19, 2012. The parties conducted a resolution meeting on September 27, 2012, while the thirty day timeline ended on October 18, 2012. The parties did not agree to shorten or waive the resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on October 19, 2012. Accordingly, a final decision shall be due on December 3, 2012.

4. The District filed a timely response on September 28, 2012.

5. A prehearing conference occurred on October 4, 2012, which resulted in a prehearing order that issued on October 10, 2012. The hearing occurred on November 14 and 15, 2012 in the Student Hearing Office. The Parent called five witnesses: Parent, Student, Independent Tutor, Educational Advocate, Compensatory and Education Consultant. Parent Exhibits #1-26 were admitted into evidence without objection. District Exhibits #1-5, were admitted into evidence without objection. The District called three witnesses: Special Education Coordinator, Program Director, and Teacher. Alana Hecht represented the Parent. Justin Douds represented the District. The hearing was closed to the public. Closing arguments occurred and closing briefs.

7. The due process hearing was held and a decision in this matter is being rendered, pursuant to 20 U.S.C.A. 1400 et seq., and its implementing regulations, 34 CFR 300 et seq. and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

## II. Issues to be Decided

8. The issues raised by the Petitioner initially were:

Issue#1: Whether the hearing officer has jurisdiction to determine whether Student can be reimbursed for compensatory education provided by Seeds of Tomorrow.

Issue #2: If I have jurisdiction, then whether Student should be reimbursed for compensatory education provided by Seeds of Tomorrow.

Issue #3: Whether Student should be provided compensatory education which Student contends he has never been provided as required by the determination and agreement of the MDT Team in June of 2009.

Issue#4: Whether Student was improperly exited from special education in June, 2011 (Student contends he was not evaluated and didn't meet any goals prior to being exited from special education. Moreover, Parent contends that Student was not allowed back into school when he desired to reenroll).

Issue#5: Whether the March, 2011 IEP has been properly designed. Specifically, the Student contends the goals are inappropriate; PLOPs are inappropriate; contents of transition plan are not appropriate; the transition plan is not based on vocational assessments; baselines are missing; needs and impact statement is missing).

Issue#6: Whether the District failed to implement the March, 2011, IEP. Specifically, the Student contends the District didn't implement the transition plan; the accommodations required by the IEP; and assistive technology required in the IEP.

The District contends that it made FAPE available at all times. Student exited from DCPS with a certificate of completion voluntarily. DCPS still needs to make FAPE available, has done so, and will continue to do so. Student exited against the advice of the staff at Woodson and felt Student needed to be there for longer. DCPS contends that its IEP was appropriate.

Student initially sought the following relief: private location of services; compensatory education with Seeds of Tomorrow (to be provided); a revised IEP; reimbursement to Seeds of Tomorrow for compensatory education already provided.

At hearing, Student withdrew his claim for compensatory education provided by Seeds of Tomorrow pursuant to a March, 2009, compensatory education plan as the District did pay for those services. As such, Issues #1 and 2 have been withdrawn. Student also withdrew his claim for a private placement at this time as his level of educational and social emotional performance cannot be determined with any accuracy.

## III. Findings of Fact

9. Student is with intellectual disabilities and vision impairments (Educational Advocate Testimony, P. Ex. 15-2, P. Ex. 21, P. Ex. 22, P6-17).

10. Student's education has been the subject of multiple HOD's. As part of one of Student's HOD's, the District was ordered to formulate a compensatory education plan. The compensatory education plan was completed on or about June 8, 2009 (P.Ex. 8). Student was to receive a laptop and computer software pursuant to the comp ed plan (P.Ex. 8). Student never received a laptop or software (Student Testimony). The District was to begin providing services by 6/22/09 (P.Ex. 8). On June 22, 2009, the District sent Parent a letter (which Student's guardian signed) which indicated the District had completed its obligations under the HOD (P Ex. 9). At that point, the undersigned makes a credibility finding that Parent and Student should have known the District might not provide all services set forth under the compensatory education plan by June 22, 2009 due to the letter sent by the District.

11. Up until June, 2011, Student had been at Woodson High School ("District LOS") in a vocational program (Student Testimony). On or about March 3, 2011, the Student's Parent requested that Student

receive a certificate of completion from the District (Parent Testimony). Student believed that the Maryland School for the Blind would be a good place for him (Parent Testimony, Student Testimony).

12. There was no evidence presented that at the meeting or thereafter (until Student obtained counsel) that Student or Parent informed the District that Parent or Student believed that the District failed to provide FAPE at District LOS.

13. Parent and Student admitted that no District person ever represented that the District would pay for a placement at the Maryland School for the Blind (Parent Testimony, Student Testimony). Nor was there any testimony (other than unsubstantiated assertions by Parent counsel) that Student was pressured to leave the District LOS.

14. Parent and Student actively lobbied the District for a certificate of completion from DCPS even though Student was still eligible for special education and related services from the District (Parent Testimony, Student Testimony).

16. The District never found Student ineligible for special education (Special Education Coordinator Testimony, Teacher Testimony).

17. A referral was made by the District to Rehabilitative Services Administration ("RSA"), an agency responsible for transition services after Student left the District (Special Education Coordinator Testimony, Teacher Testimony). Teacher physically filled out the referral form to RSA along with an aide, and a representative from RSA, Cheryl Thorpe, physically stopped by the District LOS to pick up the referral (Teacher Testimony). Student provided only unsubstantiated hearsay to the contrary, and the undersigned therefore makes a credibility finding that the District made a referral to Student to RSA.

18. RSA was invited to the March, 2011, IEP meeting (Teacher Testimony). Again, Student provided only unsubstantiated hearsay to the contrary, and the undersigned therefore makes a credibility finding that the District invited RSA to the March, 2011, IEP meeting.

19. All parties agree that Student needs to be evaluated now in order to properly determine a special education placement for student (Special Education Coordinator Testimony, Teacher Testimony, Parent Attorney admission).

20. Student was not reevaluated before being given a certificate of completion (Special Education Coordinator Testimony). Student has not been reevaluated since receiving his certificate of completion from the District (Teacher Testimony).

21. The District has repeatedly changed its story as to its understanding of the purpose and effect of the Parent's request for a certificate of completion. The District initially asserted that the Parent's request for a certificate of completion was a revocation of consent for special education services (P.Ex. 5-6). Later, the District asserted that a certificate of completion is an agreement by all the parties that

Student no longer needed special education and related services (Program Director Testimony). However, in the District's response, the District contended that Student was never exited from receiving special education and that the District believes Student still needs special education (P. Ex. 6-2,3). Finally, in its closing brief, the District contends the Parent's request for a certificate of completion constituted a notice for a unilateral placement—despite the fact that the Parent never enunciated in March, 2011, why the District's program at District LOS failed to provide Student with FAPE.

22. Moreover, Parent and Student also contend that the request for a certificate of completion is not a revocation of consent for services. However, the testimony at hearing was clear- the Parent wanted to graduate from District LOS and attend a private school. The Parent made no claim that District LOS was not making FAPE available. As such, the Parent's statements at the meeting cannot be construed as a notice of a unilateral private school placement. Parent also stated that he believed that in asking for graduation, the District would no longer provide Student with special education- at least not at a District school (Parent Testimony). Moreover, as Parent's counsel admitted in closing argument, there is no evidence that the District misled Parent and Student into believing that the District would fund a private placement for Student (Parent Counsel Closing Argument Admission).

23. The District also has repeatedly changed its story regarding whether the District must provide Student with special education. Program Director testified that there was some doubt as to whether Student resides in the District (Program Director Testimony). However, in its response, the District claimed that Student needs to enroll to receive special education and services (P6-3). The Program Director also testified that enrollment is a precondition to receiving special education, and that Student was not receiving special education because he refused to enroll (Program Director Testimony). In the resolution meeting notes, the District offered special education based on enrollment at the District LOS (R. Ex. 5-3). The Student requested an IEP meeting at the resolution meeting, but there is no record the District was/is willing to provide an IEP meeting without enrollment (R.Ex. 5-3). Based on the District Response, the resolution meeting notes, and the testimony of the Program Director, the undersigned makes a credibility finding that the District is conditioning provision of special education to Student on enrollment at District LOS or some other District school.

24. Based upon the testimony of the Parent as to what was said at the meeting and the District's first contention as to what happened at the March, 2011, meeting, the undersigned makes a credibility finding that the parties initially considered the Parent's request for a certificate of completion as a revocation of consent for special education services.

25. However, the District failed to obtain any revocation of consent in writing and also failed to issue a prior written notice regarding the revocation of consent to Parent or Student.

26. Moreover, based upon the District response and resolution meeting notes (which do not raise suspected residency in another district as a defense) and the District's exit summary which notes Student lives in the District (See R.Ex. 4-1), the undersigned makes a credibility finding that the District does not believe Student lives in another school district. Rather, the undersigned makes a credibility finding that the District has evidence and believes Student lives in the District.

**Relevant Aspects of Student's March, 2011, IEP and Criticism of Student's IEP**

27. Student does not have any goals related to speech and language goals even though speech and language services were supposed to be embedded in the curriculum (P14).

28. Student's vision goals are that Student will learn to sign and fill out bank slips; that Student will write his signature on banking documents; and that Student will make eye doctor appointments (P14). Petitioner claims these goals are inappropriate as they are unrelated to any educational purpose. The undersigned finds, however, that the goals serve a purpose in trying to teach Student functional life skills. Student further contends that some of the goals are inappropriate because he can complete the tasks in some of the goals. However, Student failed to present any evidence as to Student's functioning in March, 2011, when the IEP was drafted. As such, it is impossible to determine from the evidence in the record whether the vision goals were appropriate at the time the IEP was drafted.

29. Student's motor skills goal does not contain a way for a third party to measure Student's progress (P.Ex. 14-2). Specifically, the goal is to "demonstrate measurable growth in gross motor skills." (*Id.*).

30. Petitioner contends that the adaptive living skills goals are not measurable; are vague; and do not provide Student with concrete skills for independent living (Educational Advocate Testimony). Student's goals are to participate in group activities; navigate the school; and communicate his needs and make clear requests to adults (P Ex. 14-5). The undersigned disagrees with Petitioner's contention that these goals are not concrete or measurable. The character of Student's actions in communicating with others certainly can be observed and measured. Moreover, the Petitioner contends that these goals are inappropriate given Student's low functional ability. However, in light of the credibility finding (made below) in favor of Teacher that Student was functioning at a higher level when he was at District LOS, the undersigned rejects Petitioner's contentions that the goals are inappropriate because Student functions at a level too low to benefit from the adaptive living goals.

31. Educational Advocate and Compensatory Education Consultant contend that Student's goals in mathematics, reading, written expression, and the transition goals are inappropriate. To wit, Parent's experts claim that the goals are unrelated to addressing Student's needs; did not reflect what Student could reasonably achieve; and were not sufficiently focused on teaching Student life skills given his low cognitive ability (Educational Advocate Testimony, Compensatory Education Consultant Testimony). However, in light of the credibility finding (made below) in favor of Teacher that Student was functioning at a higher level when he was at District LOS, the undersigned rejects Petitioner's contentions that the goals are inappropriate because Student functions at a level too low to benefit from the academic goals.

32. Independent Tutor (who spent a good deal of time teaching Student) admitted that many of the goals were reasonable (Independent Tutor Testimony). Independent Tutor and Compensatory Education Consultant admitted that Student seemed to have regressed (Independent Tutor Testimony, P. Ex. 1-4). Student admitted to Independent Tutor that Student regressed in regard to math skills (Independent Tutor Testimony).

33. Petitioner also claims Student's transition plan is too advanced for Student given his cognitive abilities and that Student cannot ever have any job associated with photography. Petitioner similarly claims that the transition goals are too advanced for Student in that Student cannot complete applications, cannot understand admissions processes, and cannot understand the type of work which would require a supervisor's input. Again, according to Teacher's testimony (summarized below) , Student appeared capable of mastering the transition goals and appeared capable of having a job associated with photography in a program set up for people with special needs (Teacher Testimony). The undersigned makes a credibility finding in favor of Teacher that, in March, 2011, Student was able to master the transition goals and had the functional ability to complete the transition plan set out in the March, 2011, IEP- because no Petitioner witness assessed Student in March, 2011. Petitioner also claims that no transition assessments were ever done. There is no nonhearsay evidence to that effect in the record, and therefore, the undersigned finds that Student did not meet his burden as to District completion of appropriate transition assessments.

34. Educational Advocate and Compensatory Education Consultant testified at length that the goals in the March, 2011, IEP are not currently attainable using Student's current functioning as a baseline. Moreover, Educational Advocate and Compensatory Education Consultant also testified at length that the PLOP's in the IEP do not match the Student's level of functioning. The undersigned makes a credibility finding that Student's current level of functioning is as described by Educational Advocate and Compensatory Education Consultant based on the lack of any evidence to the contrary. However, for purposes of determining Student's functioning and academic ability when Student left District LOS, the undersigned makes a credibility finding against Educational Advocate and Compensatory Education Consultant because they never had an opportunity to evaluate Student in March, 2011, when Student was at District LOS. The undersigned makes a credibility finding in favor of Teacher that Student functioned at the levels described by Teacher in her testimony regarding Student's ability to make his goals.

35. Finally, Educational Advocate and Compensatory Education Consultant contend at length that the goals do not match Student's needs as set forth in the IEP (Educational Advocate Testimony, Compensatory Education Consultant).

36. However, Teacher testified at length (as set forth above) that she was able to formulate goals for Student and then to teach Student to his goals at District LOS in 2011 (Teacher Testimony). The undersigned, therefore finds that, to the extent the needs and baselines were misstated or vague, it did not affect the District's ability to formulate goals necessary to measure whether Student was making educational progress.

37. Moreover, the undersigned makes an inference that Teacher was able to formulate appropriate goals despite the needs and PLOP's being somewhat vague and/or not properly formulated. The Teacher testified at length as to how the academic goals were formulated, and it is clear that the Teacher had a good understanding of Student's cognitive ability and academic functioning (Teacher Testimony). Teacher may not have stated Student's needs and PLOP' s with apodictic accuracy in the IEP. However, Teacher could and did formulate measurable academic goals which Student could

reasonably complete based upon her long experience in teaching this Student. As such, the undersigned makes an inference that the fact that the Student did not lose an academic benefit because the needs, baselines, and PLOPs in the March, 2011, IEP were vague and/or misstated Student's actual abilities in March, 2011.

**The Design and Implementation of Student's IEP at District LOS**

38. Student presented no evidence of Student's performance and level at the time he was at District LOS. At the time of leaving District LOS, Student was at approximately 2nd grade reading level (Teacher Testimony). Student also reported that he was able to use the Metro and public transportation in the second semester of 2011 (Teacher Testimony). Parent corroborated that Student could use public transportation on his own (Parent Testimony).

39. Student's math goals were designed with both life skills and his interests in mind (Teacher Testimony). Because Student was often uninterested in math, the District personnel designed instruction in math around Student's interests in sports, using money, and shopping (Teacher Testimony).

40. Student's reading baselines were set using language from the Woodcock-Johnson exam (Teacher Testimony). Student did and continues to have problems with reading (Teacher Testimony).

41. Student also contends that the goals in the March, 2011, IEP are esoteric and not sufficiently connected to real world skills which Student will need in the real world. The undersigned makes an inference that it was reasonable to formulate goals and instructional strategies around Student's interests based upon Teacher's testimony that Student was uninterested in learning core subjects without a connection to Student's interests (Teacher Testimony). The District also formulated goals believing that knowledge of basic reading, writing, and math skills would be necessary for Student despite the fact that he would never be able to obtain a high school diploma (Teacher Testimony, Special Education Coordinator Testimony). The undersigned makes an inference that the skills taught in the academic goals are reasonable for ones given Student's skills and functioning at the time of the March, 2011, IEP, and that it was a reasonable choice to teach Student basic academic math, reading, and writing skills. Moreover, the undersigned notes that the goals contain many important vocational skills like resume writing, comprehending stories, following directions, complete basic bank transaction, and dealing with money (P. Ex. 14-3, P. Ex. 14-4, P. Ex. 14-6). As such, the undersigned makes an inference that the academic, vision, and transition goals were reasonably calculated to provide Student with an educational benefit given Student's level of functioning at the time of drafting the IEP.

42. While at District LOS, Student was able to write his own resume, could do a power point presentation, could write a poem, and could complete an employment application (Teacher Testimony). Student could write, but his handwriting was not neat (Teacher Testimony).

43. Student was not provided every accommodation and piece of assistive technology listed in his IEP in every classroom to help him with his vision (Teacher Testimony, Student Testimony). However, Student was provided with at least one accommodation or piece of assistive technology to aid him in reading in every class while at District LOS (Teacher Testimony, Student Testimony). Student was always able to read in class and do his classwork (Teacher Testimony).

44. Student had an interest in photography, and shadowed a photographer at District LOS (Teacher Testimony). Student also took pictures, held a camera, and read and researched how to be a photographer (Teacher Testimony). When Student couldn't read, he was able to comprehend when things were dictated to him, and he could comprehend the dictated stories (Teacher Testimony). Student was able to do some types of photography jobs while attending District LOS (Teacher Testimony).

45. While at District LOS, Student was given access to a "Very Special Arts" program (Teacher Testimony). In that program, Student would be given opportunities for photography work for disabled persons (Teacher Testimony). Student was able to use a camera and take pictures in March, 2011 (Teacher Testimony). The undersigned makes a credibility finding based upon Teacher's testimony that the Very Special Arts program would be appropriate for Student given his abilities in March, 2011.

46. Student was given travel training for the Metro and the bus while at District LOS (Teacher Testimony).

47. Student was able to maneuver in the classroom environment while at District LOS (Teacher Testimony).

48. Based upon the testimony of Teacher which was uncontradicted by any contemporaneous evidence (except some ambiguous language in the Student's needs and PLOPs in the IEP), the undersigned makes a credibility finding in favor of Teacher that Student was making academic and life skills progress at District LOS and was progressing in his goals at District LOS.

**Student's Request for Remedies**

49. Student requests for extensive compensatory education including a comprehensive evaluation (including a speech and language assessment, vision, physical therapy assessment, and transition assessments); 40 hours of assistive technology services; extensive assistive technology; a new IEP; payment for tutoring done by Seeds of Tomorrow; an interim placement at Seeds of Tomorrow; and 100 additional hours of life skills training. Student also requests a restart of the IEP creation and design process (P Ex. 1-6).

50. The compensatory education plan did not (for the most part) differentiate between compensatory education for the alleged inadequate design and implementation of the March, 2011 IEP and the wrongful exit from special education (P1).

51. Petitioner did not connect the alleged deprivations of FAPE to the elements of the compensatory plan and never explained how the compensatory education would compensate Student

for the lost educational opportunities caused by the District (Compensation Education Consultant Testimony, P1)—with a few exceptions. Compensatory Education Consultant did connect some of the compensatory education to failures to complete the compensatory education plan in 2009 (See P.Ex. 1-5, 6, ##1,2 of Additional Compensatory Education Needs). Even in the face of direct questioning, Compensatory Education Consultant linked the compensatory education requests to multiple alleged denials of FAPE, and Compensatory Education Consultant did not separate and connect the compensatory education requests to specific denials of FAPE (Compensatory Education Consultant Testimony).

52. However, the undersigned makes an inference that the Seeds of Tomorrow provided academic tutoring and life skills training which made up for some of educational benefit that Student lost from not receiving any education from the District from June, 2011 forward based on the testimony of Compensatory Education Consultant, Student, and Independent Tutor who described the services provided to Student.

53. Moreover, the undersigned finds that Compensatory Education Consultant provided no other prospective relief for the failure of the District to provide services from June, 2011, forward. All other compensatory education requests were attached to other alleged failures of the District (Compensatory Education consultant Testimony).

## IV. Conclusions of Law

54. The Federal and State Special Education Laws are set out in the Individual with Disabilities Education Act, 20 U.S.C.A. 1400 *et seq.* ("IDEA") and in the District of Columbia Municipal Code. In enacting IDEA, Congress intended to establish a "cooperative federalism." *Evans v. Evans*, 818 F.Supp.1215, 1223 (N.D. Ind. 1993). Compliance with minimum standards set out by the federal act is necessary, but IDEA does not impose a nationally uniform approach to the education of children with a given disability. *Id.* Thus IDEA does not preempt state law if the state standards are more stringent than the federal minimums set by IDEA. *Id.*

55. In regard to the burden of proof in a special education proceeding, the Supreme Court has held that the ultimate burden of persuasion lies with the party filing the due process complaint. *Schaffer v. Weast* 546 U.S. 49 (2005). Parents must prove their case by a preponderance of the evidence. However, once a parent has proven a denial of FAPE, the parents have met their burden. *Henry v. District of Columbia,* 55 IDELR 187, 750 F.Supp.2d 94 (D.D.C. 2010). At that point, the hearing officer must provide the student with an individualized remedy to make the student whole for the denial of FAPE. *Id.*

56. In determining whether a placement is proper under IDEA, the hearing officer does not need to defer to the party witnesses. *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990)(hearing officer characterized as having specialized expertise in special education and special education law); *See also School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167 (7th Cir. 1994)(hearing officer characterized as expert witness in determining whether placement is proper).

57. In administrative proceedings, hearsay is admissible as long as it is relevant and material. *Hoska v. United States Department of the Army,* 677 F.2d 131 (D.C. Cir. 1982); *Johnson v. United States,* 628 F.2d 187 (D.C. Cir. 1980). To the extent hearsay is admitted without objection, the evidence can be given its natural weight. *Sykes v. District of Columbia,* 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

58. Admissions by counsel constitute evidentiary admissions and can be considered by the trier-of-fact. *A-J Marine, Inc. v. Corfu Contractors,* 810 F.Supp.2d 168 (D.D.C. 2011) *Burman v. Phoenix Worldwide Industries, Inc.* 384 F.Supp.2d 316 (D.D.C. 2005).

59. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Bray v. United States,* 306 F.2d 743 (D.C. Cir. 1962); *Dell v. Department of Employment Services,* 499 A.2d 102 (D.C. Ct. of App. 1985). Hearing officers can make reasonable inferences from the evidence adduced at hearing. *Dell, supra.* However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Charles v. Astrue,* 2012 WL 1194707 (D.D.C. 2012).

60. Expert opinions are admissible if the experts are considered qualified through either training or experience. *Jenkins v. United States,* 307 F.2d 637 (D.C. Cir. 1962). To the extent the hearing officer relies upon expert opinions, the expert opinions must be inferred ultimately from facts in the record, and the inferential process by which an expert reaches his/her conclusions must be fully explained. *Giant Food Stores, Inc. v. Fine*, 269 F.2d 542 (D.C. Cir. 1960) (expert testimony must be grounded by material facts in the record); *The Nereide*, 9 Cranch 388 (1815) (in litigation, witnesses must testify as to the train of their inferential reasoning).

61. Expert testimony can be based on facts supplied by a hypothetical question or by testimony from another witness at trial. *Hartford Accident and Indemnity Co. v. Dikomey Manufacturing Jewelers, Inc.* 409 A.2d 1076 (D.C. App. 1979).

62. In determining whether an expert is qualified on a specific subject matter, education, experience, or other training can provide the appropriate qualifications for an expert. *Jenkins v. United States, supra.* See also *Fox v. Dannenberg*, 906 F.2d 1253, 1255 (8th Cir. 1990) and *United States v. Briscoe,* 896 F.2d 1476, 1498-1497 (7th Cir. 1990).

63. Hearing officers are entitled to and often need to make credibility findings. *Stephens Media, LLC v. National Labor Relations Board,* 677 F.3d 1241 (D.C. Cir. 2012).

64. The IDEA also requires a decision based upon substantive grounds based on whether a child received FAPE. 20 U.S.C.A. 1415(f)(3)(i); *A.G. v. District of Columbia.* 57 IDELR 9, 794 F.Supp.2d 133 (D.D.C. 2011). This requirement imposes upon all administrative hearing officers the obligation to structure the hearing so as to properly make an administrative record. *Id.* As in most state administrative proceedings, District of Columbia impartial hearing officers have the power not only to listen to evidence presented by the parties, but to affirmatively find facts necessary to properly to

determine which party should prevail under the law. *A.G., supra, Gill v. District of Columbia,* 751 F.Supp.2d 104 (D.D.C. 2010) (the educational needs of a special needs child cannot be forfeited by poor lawyering and an incomplete record); *See also,* Frank Cooper, State Administrative Law, Vol. 1, Bobbs-Merrill Company, Inc. (1965), pg. 336 .

In administrative litigation, the hearing officer must be concerned with not only ensuring a fair process wherein the parties can present evidence, but also a proper result under the law because there is a significant public interest in properly having the law carried out. Landis, John, "*The Administrative Process,*" Yale University Press (1938) excerpted in Foundations of Administrative Law, Schuck, Peter (ed.) Foundation Press (2004), pp. 13-14. For this reason, administrative hearing officers are constitutionally permitted to depart from the adversarial model and independently obtain evidence and develop an administrative record while remaining a neutral and impartial decision maker. *Sims v. Apfel,* 530 U.S. 103, 110-11 (2000); *Richardson v. Perales,* 402 U.S. 389, 400-401 (1971) (social security administrative law judges constitutionally permitted to develop the record to determine all facts necessary whether benefits should be granted under law).

65. Although the School District must comply with the procedural requirements of IDEA, hearing officers can only enter an order against the District if the procedural inadequacies: (1) impeded the Student's right to a free appropriate public education; or (2) denied the student some educational benefit; or (3) significantly impeded the parents' ability to participate in the decision making process regarding the provision of a free appropriate public education. 20 U.S.C.A. 1415(f)(E)(ii)(I-III).

66. Parents must file their due process complaint alleging violations of IDEA within two years of the time the parents knew or should have known of the alleged action which forms the basis of the complaint. 20 U.S.C. 1415(f)(3)(C). The timeline begins to run when the parent knew or should have known about the injury to the child. *Centennial School District v. S.D.*, 58 IDELR 45 (E.D. Penn. 2011), *R.B. v. Department of Education of the City of New York,* 57 IDELR 155 (S.D.N.Y. 2011). *Mittman v. Livingston Township Board of Education,* 55 IDELR 139 (D.N.J. 2010); *Gwinnett County School District v. A.A.,* 54 IDELR 316 (N.D. Ga. 2010).

**Conclusions of Law Related to the Certificate of Completion and Student's Request**

67. In general, reevaluations are necessary when there is a significant change in placement- including an exit from special education or a particular service the District provides. 34 CFR 104.35(a); *De Soto (KS) Unified School District #232,* 52 IDELR 20 (OCR 2008). However, this duty arises under Section 504 (the Rehabilitation Act of 1973), not IDEA. Due process hearing officers in the District of Columbia have no authority to hear Section 504 violations. Due process hearing officers do have authority to hear any matter associated with a failure to evaluate a child with a disability. 20 U.S.C. 1415(b)(6)(A). However, the undersigned holds that this section applies only to duties to evaluate which arise under IDEA. Under IDEA, a district is required to conduct a reevaluation when a district has made a determination that an eligible child is no longer a child with a disability. 20 U.S.C. 1414(c)(5). Contrary to Petitioner's contentions, that situation does not exist here as Parent and Student were the ones who sought to terminate special education- not the District. However, for eligible students within the

District, IDEA requires reevaluations at least every three years and earlier if appropriate for the student. 34 CFR 300.303.

68. The undersigned rejects the case law that states that a district must continue to provide services to a student or find the student ineligible for special education (i.e. find that Student is ineligible for special education) in this case because of the consent provisions of the law enacted in 2005 as discussed below. Specifically, a parent or adult student can voluntarily terminate special education and related services by revoking consent. In such a case, the District need not provide special education and related services even though the district still believes that the child is eligible for special education (See citations below).

69. Prior to 2005, Districts had an obligation to provide special education and related services regardless of the parents' desire to receive said services. However, in 2005, Congress changed the law giving parents (and adult students) an absolute right to withdraw from receipt of special education services. 20 U.S.C. 1414(a)(1)(D)(ii)(II). In such circumstances, a District has no obligation to provide a child with disability with special education and related services (*id*).

70. If parents do initially consent to special education, consent can be revoked by a written revocation of consent. 34 CFR 300.9(c )(2); 34 CFR 300.300(a)(4). If an appropriate revocation is received, the District is no longer required to provide the child with special education and related services. *Id.* A revocation must be in writing and the District must issue prior written notice before terminating services. *Id.*

71. After a Parent or adult consents to special education, the District cannot condition provision of services based on enrollment, and the District must make FAPE available prior to enrollment in any school. *D.S. v. District of Columbia,* 54 IDELR 116 (D.D.C. 2010); *District of Columbia v. West,* 54 IDELR 117 (D.D.C. 2010).

72. A district has an obligation to find, evaluate, and make FAPE available to every student whether the student attends a district school or not. 34 CFR 300.111; 34 CFR 300.131.

73. Even if a Parent or adult Student refuses to consent to special education services, this does not mean that a district is excused from its duty to evaluate the student. 34 CFR 300.300(c)(3).

**Conclusions Related to IEP Design**

74. Student is entitled to an IEP designed to provide a Free Appropriate Public Education ("FAPE"). FAPE is defined as an educational placement reasonably calculated to provide Student with an educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley,* 458 U.S. 176 (1982). The District need not provide a program designed to maximize Student's educational potential. *Id.* Rather, the District only needs to provide a program designed to produce substantial educational progress. *Id.*

75. An IEP team must thus develop an IEP which is reasonably calculated to provide the student with an educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley,* 458

U.S. 176 (1982); *T.H. v. District of Columbia,* 52 IDELR 216, 620 F.Supp.2d 86 (D.D.C. 2009). *Hunter v. District of Columbia,* 51 IDELR 34 (D.D.C. 2008). To do so, the IEP must be reasonably calculated to produce substantial progress, not regression or trivial academic advancement. *M.B. v. Hamilton Southeastern Schools,* 668 F.3d 851 (7th Cir. 2011).

76. Although a district is not required to maximize a student's potential, a reasonable calculation of an educational benefit is gauged using a student's potential- even though the District is not required to maximize a student's potential in designing an IEP. *Ridgewood Board of Education v. N.E.,* 172 F.3d 238, 247 (3rd Cir. 1999).

77. In determining whether IEP design is reasonable, a student's academic progress under the proposed IEP is evidence a hearing officer must consider. *T.H. v. District of Columbia,* 52 IDELR 216, 620 F.Supp.2d 86 (D.D.C. 2009). *Hunter v. District of Columbia,* 51 IDELR 34 (D.D.C. 2008). However, a lack of academic progress is not dispositive of whether the IEP has been reasonably designed to provide a student with FAPE. *Id. See also Lessard v. Wilton Lyndeborough Cooperative School District,* 518 F.3d 18, 29 (1st Cir. 2008).

78. Specifically, when a hearing officer determines whether an IEP is reasonably designed to provide a student with FAPE, the hearing officer must judge the district based upon what the district knew or reasonably could have known at the time the IEP was drafted. *S.S. v. Howard Road Academy,* 51 IDELR 151, 585 F.Supp.2d 56 (D.D.C. 2008). *See also M.B. v. Hamilton Southeastern Schools,* 668 F.3d 851 (7th Cir. 2011); *Thompson RJ-J School District v. Luke P.,* 540 F.3d 1143 (10th Cir. 2008); *Adams v. State of Oregon,* 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. East Hannover Board of Education,* 993 F.2d 1031, 1041 (3rd Cir. 1993); *Roland M. v. Concord School Committee,* 910 F.2d 983, 992 (1st Cir. 1990).

79. The IEP must comply with the requirements set forth in 20 U.S.C.A. 1414(d) in order to provide FAPE. 20 U.S.C.A. 1401(9). Section 1414(d) requires measurable goals designed to meet the child's educational needs that result from the student's disability. *SS v. Howard Road Academy,* 585 F.Supp.2d 56 (D.D.C. 2008); *Sarah D. v. Board of Education of Aptakisic-Tripp Community Consolidated School District No. 102,* 642 F.Supp.2d 804, 52 IDELR 281 (N.D. Ill. 2009).

80. Thus, in order to provide substantive FAPE, an IEP must establish goals which respond to all significant facets of a student's disability, both academic and behavioral. *Sarah D., supra.* When a student has a learning disability, the goals must address the student's learning disability. *Pennsbury School District,* 48 IDELR 262 (PA SEA 2007).

81. Goals should describe what a child with a disability can reasonably be expected to accomplish within a 12 month period in a special education program. *Letter to Butler,* 213 IDELR 118 (OSERS 1988).

82. Each IEP goal should correspond to some item of instructions or services identified in the IEP. *Burlington School District,* 20 IDELR 1303 (SEA VT 1994).

83. An IEP that lacks meaningful educational goals may be fatally defective. *Susquentia School District v. Raelee S,* 25 IDELR 120 (M.D. Pa. 1996). It is difficult to appropriately address a student's

needs without first defining the goals which will provide a reasonable educational benefit. *Conemaugh Township School District*, 23 IDELR 1233 (SEA PA 1996).

84. The goals should be specific enough for the providers and the IEP Team to determine whether a student is making educational progress and should contain evaluative criteria so that an IEP Team can objectively determine whether progress is being made. *In Re Student with a Disability,* 50 IDELR 236 (SEA NY 2008); *Anchorage School District,* 51 IDELR 230 (AK SEA 2008). The goals cannot be so inexact or subjective so as to blur whether a child is making objective educational progress. *Id.* The goals should be specific enough to allow educators to address instructional plans for the student. *Board of Education of Rondout Valley Central School District,* 24 IDELR 203 (SEA NY 1996).

85. In general there is no need for a goal for related services unless the related services are integrated into the provision of Student's instruction at which points goals related to the related service then become necessary. *Letter to Hayden,* 22 IDELR 501 (OSEP 1994); *Letter to Smith,* 23 IDELR 344 (OSEP 1995).

86. A Student's IEP must contain a statement of the child's present levels of academic achievement and functional performance including how the child's disability affects the child's involvement and progress in the general education curriculum. 34 CFR 300.320(a)(1). The statement of present levels must be accurate so that the IEP Team can use the present levels as a baseline for developing goals, measuring future progress, and designing educational programming. *Bakersfield City School District,* 51 IDELR 142 (SEA CA 2008). The present levels must be all-encompassing so as to provide a baseline that reflects the entire range of the child's needs both academic and nonacademic. 34 CFR 300.324(a). The statement should encompass a student's needs, strengths, interests, and learning style. *Id.* In order to fully comply with the pertinent regulation, the statement should include: the child's academic achievement level; testing scores and an evaluation of scores; the child's physical and psychological condition including any physical impairment which could affect instruction; the child's emotional maturity, self-help skills, social adaptation, functional behavior, and development; and a statement of the child's prevocational and vocational skills. *Id.*

87. If a statement does not consider the unique needs of a student, establish a baseline for establishing goals, or allow informed parental participation in the IEP process, then the IEP may deny the Student FAPE. *Freidman v. Vance,* 24 IDELR 654 (D. Md. 1996); *Portland Public Schools,* 24 IDELR 1196 (SEA ME 1996); *Conemaugh Township School District*, 23 IDELR 1233 (SEA PA 1996).

88. Failure to properly set out the components of an IEP is a procedural violation of an IDEA. *A.I. by Iapalucci v. District of Columbia,* 402 F.Supp.2d 152, 44 IDELR 255 (D.D.C. 2005). Moreover, to the extent a district fails to provide measurable or concrete goals, this is a procedural violation of IDEA. *Rosinsky v. Green Bay Area School District,* 53 IDELR 193, 667 F.Supp.2d 964 (E.D. Wis. 2009).

89. Similarly, IDEA requires that all IEPs for all children over 16 contain a transition plan and transition services based upon transition assessments designed to training, education, and where appropriate, independent living skills. 20 USCA 1414(d)(1)(VIII)(aa,bb). Provision of transition services must be results oriented and is focused on the academic and functional achievement of the child to

facilitate the child's movement to adult education, adult services, independent living, and towards employment. 34 CFR 300.43. However, like the other required components of an IEP, flaws in the transition plan and transition goals are procedural violations of IDEA. *Board of Education of Township High School District 211 v. Ross,* 486 F.3d 267 (7th Cir. 2007).

90. Agencies likely to provide for or pay for postsecondary transition services should be invited to IEP meetings. 34 CFR 300.321(b)(3).

**Conclusions of Law Related to IEP Implementation**

91. Material violations of a student's IEP will be a denial of FAPE and a violation of IDEA for which a parent and student can obtain redress in a due process hearing. *Savoy v. District of Columbia,* 58 IDELR 129 (D.D.C. 2012); *See also Sumter County School District 17 v. Heffernan,* 642 F.3d 478 (4th Cir. 2011); *Van Duyn v. Baker School District 5J,* 502 F.3d 811, 822 (9th Cir. 2007); *Neosho R-V School District v. Clark,* 315 F.3d 1022, 1027, nt. 3 (8th Cir. 2003); *Houston Independent School District v. Bobby R,* 200 F.3d 341, 349 (5th Cir. 2000).

92. In determining whether there has been a material violation of the IEP, ". . .the focus is on the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld." *L.J. v. School Board of Broward County,* 58 IDELR 220 (S.D.Fl. 2012), relying on and citing with approval, *Wilson v. District of Columbia,* 770 F.Supp.2d 270, 275 (D.D.C. 2011).

93. A district must comply with the terms of the IEP to deliver FAPE *Board of Education of the City of Chicago v. Illinois State Board of Education,* 55 IDELR 133, 741 F.Supp.2d 920 (N.D. Ill. 2010). Therefore, ". . .The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail in an implementation failure claim, although the child's educational progress, or lack of if, may be probative of whether there has been more than a minor shortfall in the services provided." *L.J. v. School Board of Broward County, Supra, See also, Board of Education of the City of Chicago, supra.* The reason for this rule is to prevent a district from drafting an elegant IEP and then ignoring it until the parents can prove an educational harm. *Board of Education of the City of Chicago, supra.*

94. The District must implement the IEP as written, and cannot change the written requirements of the IEP without an amendment of the IEP by the IEP Team. *Independent School District No. 281 v. Minnesota Department of Education,* 48 IDELR 222, 107 LRP 56347 (Minn.Ct. App. 2007).

95. When judging a school district's actions, the undersigned must defer to the District as to disputes among appropriate methodologies to educate the student. *White v. Ascension Parish School Board,* 343 F.3d 373 (5th Cir. 2003); *G.D. v. Westmoreland School District,* 930 F.2d 942 (1st Cir. 1991); *Lachman v. Illinois State Board of Education,* 852 F.2d 290, 297 (7th Cir. 1988). The District is entitled to choose among reasonable methodologies to provide a student FAPE, and the parent does not have the right to veto the district's reasonable methodological choices. *Id.* The reasonable choice of the school district as to methodology need not even need to be the best choice available. *G.D., supra.* As such, a district must be able to choose among different reasonable methodologies in making the day-to-day

decisions on how to deliver the services and provide the accommodations listed in the student's IEP. *Independent School District No. 281, supra; Hiawatha School District No. 426,* 58 IDELR 269, #136 (Ill. SEA. 2012); *Belvidere Community Unit School District No. 100,* 108 LRP 42811 (Ill. SEA. 2008). A district is entitled to some flexibility in how to implement an IEP. *L.J. v. School Board of Broward County, Supra*

96.. Decisions on how and where to provide related services and accommodations generally do not amount to material violations of an IEP. *Catalan v. District of Columbia,* 478 F.Supp.2d 73 (D.D.C. 2007). See also *Houston Independent School District v. Bobby R.,* 200 F.3d 341, 348-349 (5th Cir. 2000). If there are good reasons for a violation of the technical terms of an IEP in providing accommodations and related services, this is not a material violation of the IEP. *Id.*

**Conclusions of Law Related to Remedies**

97. Compensatory education is an equitable remedy hearing officers can award to prevailing petitioners. *Reid v. District of Columbia,* 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). Compensatory education should compensate a child for loss of educational opportunity caused by the District's failures to provide FAPE. *Id.* In determining whether compensatory education, the award should be based upon the equitable factors present in each case (including the conduct of the parties). *Id.* A hearing officer's decision should set forth a reasoned way in which the compensatory services will make the student whole for loss of FAPE. *Id.*

98. In determining how much compensatory education to award, the undersigned must weigh the equitable factors in each case including: what compensatory education is appropriate to award *Branham v. District of Columbia,* 44 IDELR 149, 427 F.3d 7 (D.C. Cir. 2005). The conduct of the parties is an equitable factor in determining whether and how much compensatory education is appropriate to award. *Richardson v. District of Columbia,* 50 IDELR 6, 541 F.Supp.2d 346 (D.D.C. 2008).

99. The undersigned does not have to provide a specific type of compensatory education (or any compensatory education) if the petitioner fails to provide a basis for determining Student's current educational and functional ability; how student was harmed by the District's violations of IDEA; and how the proposed services will compensate Student for the loss of educational benefit arising from the District's violations of IDEA. *Gill v. District of Columbia,* 56 IDELR 129, 770 F.Supp.2d 112 (D.D.C. 2011).

**V. Application of Law to Fact**

100. The undersigned finds that any claim under the compensatory education plan of June, 2009, is barred by the statute of limitations, as the Parent should have known by late June, 2009, that the District might not provide the services in the compensatory education plan. Parent and Student failed to file a due process complaint within 2 years of late June, 2009, and thus any claim thereunder is barred.

101. The undersigned finds that the District denied Student FAPE by failing to provide special education and related services after the June, 2011, certificate of completion. The District did not find Student ineligible for special education; did not obtain an appropriate revocation of consent in writing;

did not issue a prior written notice of revocation of consent; and did not continue to provide services to Student. The District then compounded its denial of FAPE by failing to provide services and by conditioning provision of special education on enrollment in the District. Likewise, the District failed to reevaluate Student even though the District had a continuing duty to do so.

102. The undersigned finds that the reading, writing, math goals, vision goals, and adaptive living goals were appropriate given Student's functioning in March, 2011.

103. The undersigned finds Student's transition goals and transition plan appropriate given Student's functioning in March, 2011. The undersigned finds that RSA was invited to the IEP meetings, and the District complied with its statutory obligations by issuing the invitation to RSA.

104. The undersigned finds that any inadequacies in the PLOPs, and needs and impacts statement are harmless procedural errors as Student could not demonstrate any loss of an educational benefit or any way this caused Parent not to be able to participate in the IEP creation process.

105. The undersigned finds that Student should have had a speech and language goal because the related service was embedded in the curriculum, and that Student's motor skills goal was not measurable.

106. The undersigned further finds that the Student did not demonstrate how inadequacies in the inappropriate goals or the lack of a speech and language goal caused a loss of educational benefit or an inability of the Petitioner to participate in the IEP creation process. As such, Petitioner did not prove that he is entitled for relief for inappropriate goals or missing goals.

107. The undersigned finds that because some accommodations and some assistive technology was provided to Student in every class while at District LOS, and because Student was able to access the curriculum with the partial accommodations available in each class, there was no material violation of the March, 2011, IEP for failure to provide accommodations and assistive technology.

108. The undersigned finds that the District implemented the transition plan I in March, 2011, IEP until the certificate of completion in June, 2011 based upon the uncontradicted testimony of Teacher.

109. The undersigned finds that there is evidence for the following remedies which will compensate Student for the District's failure to provide FAPE or reevaluate Student from June, 2011, to the present: (1) reimbursement of 192 hours of tutoring for services provided by Seeds of Tomorrow; (2) a full and comprehensive evaluation; and (3) an IEP meeting, revised IEP, and placement at a location of services capable of providing Student with FAPE.

110. The undersigned finds that the Petitioner did not provide adequate proof for any other request for compensatory education and/or the requested compensatory education was for allegations of District wrongdoing which Petitioner failed to prove.

## V. Order

111. Within 45 days of this order, the District shall complete a comprehensive evaluation of Student. The evaluation shall include a speech and language assessment, vision, physical therapy assessment, and transition assessments. This list is not meant to be exhaustive, and the District must complete whatever assessments necessary to comprehensively evaluate Student.

112. Within 21 days of completing the comprehensive evaluation, the District shall call an IEP meeting for an IEP Team to determine a new IEP, placement, and location of services for Student. In creating the new IEP, the IEP Team shall formulate measurable goals in all areas where goals are legally required (including speech and language services).

113. Within 21 days of this order, the District shall reimburse Student for 192 hours of tutoring provided by Seeds of Tomorrow at $75.00 per hour.

114. Within 10 days of this order, the District shall issue a prior written notice for a location of services for Student. Until the reevaluation is completed and the new IEP drafted, the District may use the March 3, 2011, IEP to determine an appropriate location of services for Student. After Student is assigned to his new location of services and until the new IEP is completed, the staff at the new location of services may use formal and informal assessments to determine how to best provide an educational benefit to Student. After a new IEP is available, the District staff shall provide special education to Student in accordance with the new IEP.

115. Student's other requests are denied.

Dated this 3rd day of December, 2012.

/S Joseph P. Selbka

Joseph Selbka, Esq.

Hearing Officer

**NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).