

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parents], on behalf of
[Student],¹

Date Issued: November 21, 2011

Petitioners,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2011 NOV 21 PM 1:24

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioners on September 9, 2011.

A resolution meeting was convened on September 19, 2011 and no agreements resulted and the 30 day resolution period was not suspended. A response to the complaint was filed on September 20, 2011. A prehearing conference was held on September 29, 2011 and a prehearing order was issued on that date.

The Office of the State Superintendent of Education (OSSE) was named as a respondent in the complaint and was dismissed from the complaint on October 14, 2011. The Respondent

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

(DCPS) also filed a motion to dismiss the complaint on October 6, 2011, and this motion was denied on October 14, 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. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the independent hearing officer (IHO) is:

Whether the Respondent denied the Student a free appropriate public education (FAPE) by failing to provide her the related service of transportation, as required by her individualized education program (IEP), since August 22, 2011?

The substantive requested relief at the time of hearing is:

- An IEP team meeting to review and revise the Student's IEP, if necessary
- Compensatory education

The Student was not provided with special education and related services in conformity with her IEP since school started August 22, 2011. The IEP was not implemented because the Respondent failed to provide transportation to the Student to get to school (at this time transportation was not a related service), and when transportation was added to the IEP on September 1, 2011, it was one of all services not provided in conformity with the IEP (and was

not properly documented in the IEP as the projected start date and the anticipated frequency, location, and duration of transportation was not documented). The Petitioners refused to send the Student to school after September 20, 2011, and are responsible for the Student's failure to attend from that point on.

IV. EVIDENCE

Six witnesses testified at the hearing, three for the Petitioners and three for the Respondent.

The Petitioners' witnesses were:

- 1) The Student's Father, Petitioner 1 (S.F.)
- 2) The Student's Mother, Petitioner 2 (S.M.)
- 3) Dr. Ida Jean Holman, Education Advocate (expert in delivery of special education services) (I.H.)

The Respondent's witnesses were:

- 1) Maureen Anderson, DCPS Office of Special Education Transportation Specialist (M.A.)
- 2) Special Education Coordinator,
- 3) Assistant Principal,

Four exhibits were admitted into evidence of seven disclosures from the Petitioners. The

Petitioners' exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	September 7, 2010	IEP
P 5	June 20, 2011	Report to Parents on Student Progress
P 6	Undated	Resume of Ida Jean Holman
P 7	Undated	Curricula Vitae of Natasha Nelson

Six exhibits were admitted into evidence of seven disclosures from the Respondent. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	June 14, 2011	IEP
R 2	Undated	Student Transportation Form
R 3	August 29, 2011	[Contact Record]
R 4	September 1, 2011	IEP
R 5	Undated	Student Transportation Form
R 6	September 20, 2011	Bus Trip Ticket
	September 21, 2011	Bus Trip Ticket
	September 22, 2011	Bus Trip Ticket
	September 23, 2011	Bus Trip Ticket
	September 26, 2011	Bus Trip Ticket
	September 27, 2011	Bus Trip Ticket
	September 28, 2011	Bus Trip Ticket
	September 28, 2011	Bus Trip Ticket
	September 29, 2011	Bus Trip Ticket
	September 30, 2011	Bus Trip Ticket
	October 3, 2011	Bus Trip Ticket
	October 4, 2011	Bus Trip Ticket
	October 5, 2011	Bus Trip Ticket
	October 6, 2011	Bus Trip Ticket
	October 7, 2011	Bus Trip Ticket
	October 11, 2011	Bus Trip Ticket
	October 12, 2011	Bus Trip Ticket
	October 13, 2011	Bus Trip Ticket
	October 21, 2011	Bus Trip Ticket
	October 24, 2011	Bus Trip Ticket
	October 25, 2011	Bus Trip Ticket
	October 26, 2011	Bus Trip Ticket
	October 27, 2011	Bus Trip Ticket

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 findings of fact more properly considered a conclusion of law is adopted as such. Any conclusion of law more properly considered a finding of fact is adopted as such.

enrollment form had not been turned in.¹⁰ The Student's Mother contacted the school and was told the Student was not in the computer for the school bus.¹¹

6. The day the bus did pick up the Student she was brought to school and not permitted to enter due to the lack of an enrollment form.¹² The Student walked home from school and has not yet gone back.¹³ The Petitioners' refused to send the Student back to school because the Student claimed to have been threatened with being "jumped" by gangsters.¹⁴
7. Because the IEP, revised June 14, 2011, indicated the Metro as the method of the related service of transportation, the Respondent sent the Petitioner a Metro Fare card which the Petitioners deny receiving.¹⁵
8. The IEP was amended as of September 1, 2011 without a meeting but based on discussions between and the Petitioners to include transportation via bus.¹⁶ The Petitioners were sent a copy of the IEP but no prior written notice.¹⁷ The IEP still does not specify the projected start date for transportation, nor the frequency, location, or duration of the service.¹⁸
9. The Student receives special education services in the mainstream setting but for mathematics for one hour per week outside of the mainstream setting.¹⁹
10. At the conclusion of the 2010-2011 school year the Student failed five of her seven classes for the year.²⁰ She received a "C" in Extended Literacy 10, and a "D" in Reading Workshop

¹⁰ T of S.F., T of S.M., T of S.S. R 6. (There are no Bus Trip Tickets prior to September 20, 2011, the date witnesses stated the bus first came for the Student.)

¹¹ T of S.M.

¹² T of S.F., T of S.M.

¹³ T of S.F., T of S.M., T of S.S.

¹⁴ T of S.F., T of S.M., T of I.H.

¹⁵ T of S.F., T of S.M.

¹⁶ R 4, T of T.W.

¹⁷ R 4, T of S.M., T of T.W.

¹⁸ R 4

¹⁹ R 4.

I.²¹ Because the Student has not attended school this school year, no educational progress in the curriculum or towards IEP goals could have been made.

11. I.H. testified that the Student missed over 100 hours of specialized instruction and therefore needs 30 hours of tutoring and 10 hours of mentoring.²² The expert's testimony is given little weight because the witness was not able to explain how the proposed compensatory services would put the Student in the place she would have been but for the denial of a FAPE.

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

²⁰ P 5.

²¹ P 5.

²² T of I.H.

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.

3. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006).
4. The Supreme Court has described the purpose of the IDEA as providing a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). When a child is mainstreamed:

the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.

Id. at 203. The Court held:

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. at 203-204. Thus, the "basic floor of opportunity" provided by the IDEA for this Student, and as described by the Supreme Court, consists of the opportunity for advancement in the grade level content for the grade in which the Student is enrolled.

5. An IEP is “a written statement for [a] child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324,” 34 C.F.R. § 300.320(a).
6. IEPs must include a statement of the projected date for the beginning of related services and the anticipated frequency, location, and duration of related services. 34 C.F.R. § 300.320(a)(7), D.C. Mun. Regs. 5-E3009.1(h).
7. Federal Regulations at 34 C.F.R. § 300.503 provide:

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

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

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

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the agency’s proposal or refusal.

8. The IEP did not properly include transportation as a related service until it was amended September 1, 2011. Transportation was not discussed at the IEP team meeting in June and no written notice was provided noting the proposed transportation. Thus, because the Petitioners’ were not provided due process (no discussion and no proper notice) regarding the addition of that related service in the Student’s program, it cannot be treated as valid.
9. An IEP may be amended without a team meeting. 34 C.F.R. § 300.324(a). The Petitioners and Respondent did this after discovery of the addition of the transportation via Metro on the IEP. Transportation was then listed as via bus, although it was still not properly documented. The lack of proper documentation, given the Petitioners’ involvement with the agreement to

amend the IEP, is not sufficient to invalidate the September 1 provision of transportation as a related service.

10. The IDEA “is violated when a school district deviates *materially* from a student’s IEP.” Wilson v. D.C., C.A. 09-02424, p 7 (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.
11. Regardless of the status of transportation as a related service, no special education and related services have been provided to the Student this school year. The Respondent did not

implement the IEP from the start of the school year until September 21, 2011, because it did not send a bus to pick up the Student, even after notified by the Student's Mother that the bus was not arriving to pick up the Student. When the Respondent finally did send a bus, the school staff refused to permit the Student attend, despite the Respondent's obligation to implement the IEP.²³ A failure to provide any services for a full month (four weeks), is a per se material failure to implement. "[A] 'complete failure' to implement a student's IEP is 'undoubtedly' a denial of an appropriate education under the IDEA." Wilson v. D.C., 770 F.Supp 2d, 270, ___, 56 IDELR 125, footnote 1 (D.D.C. 2011), *citing* Abney ex rel. Kantor v. District of Columbia, 849 F.2d 1491, 1496 n.3 (D.C. Cir. 1988).

12. After September 20, 2011, the Petitioners refused to send the Student to school. The Respondent cannot be accountable for the Petitioners' failure to send the Student to school.
13. 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). 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

²³ Annual verification of residency was to be resolved by October 5, and the Student was not to be refused attendance pending verification per D.C. Mun. Regs. 5-A5002.

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).

14. The Student is entitled to compensatory education to remedy the denial of FAPE caused by the Respondent's failure to implement the IEP and provide the student access to the curriculum from August 22, 2011 through September 20, 2011. Determining the compensatory services is a challenge in this case because no evidence was presented to show where the Student would have been educationally but for the denial of FAPE, the Petitioners refused to send the Student to school after September 20, 2011, and the Student was failing most of her classes at the conclusion of the prior school year. To compensate for the four weeks of school, including special education services, not provided from August 22, 2011, through September 20, 2011, the Student will be provided the opportunity to make up the missed classes during the summer of 2012, including the special education and related services to assist the Student in benefiting from that instruction.²⁴ The Respondent shall determine how to deliver that missed instruction over the summer of 2012, and it must include the academic content the Student was not provided. The make-up course work and special education and related services may necessarily cover the material the Student missed as a result of her parents' refusal to send her to school after September 20, 2011, and this is of no consequence to this order.

²⁴ An underlying dispute over whether the enrollment for was turned in is not relevant because it is not germane to whether the Respondent was require to implement the Student's IEP, and no evidence or argument was made that the Student was not a resident of the District.

VII. DECISION

The Petitioner prevails because the Respondent denied the Student a FAPE when it did not provide special education and related services to the Student in conformity with her IEP from August 22, 2011, through September 20, 2011.

VIII. ORDER

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

1. Prior to April 1, 2012, the Respondent will present a compensatory education plan for the Student to the Petitioners. The plan will address when, where, and from whom the course work the Student was denied from August 22, 2011, through at least September 20, 2011, will be provided during the summer of 2012. The plan will specify the course work to be provided, consistent with what was missed at from August 22, 2011, through at least September 20, 2011, and the curriculum content areas or education standards to be addressed. Special education and related services will be provided in conformity with the Student's IEP in order to ensure the Student's opportunity to access the missed coursework and education standards. The Student will be provided transportation to access the course work, if necessary, at no charge, regardless of whether transportation remains a related service in her IEP.
2. The IEP will be revised, consistent with this order, no later than December 7, 2011. The IEP must be revised to include the anticipated frequency, location, and duration of all special education and related services, supplementary aids and services, and any program modifications or supports for school personnel that will be provided in the IEP, pursuant to 34 C.F.R. § 300.320. Nothing in this order prevents the IEP team from making other

revisions to the IEP it determines are necessary to provide FAPE, based on documented data and properly recorded in a written notice consistent with 34 C.F.R. § 300.503, and D.C. Mun. Regs. 5-E3024.1.

IT IS SO ORDERED.

Date: November 21, 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).