

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

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

OSSE
Student Hearing Office
April 24, 2013

[Parent], on behalf of
[Student],¹

Date Issued: April 24, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on February 15, 2013. A response to the complaint was filed on February 25, 2013. A resolution meeting was convened on March 4, 2013, and resulted in no agreements. A prehearing conference was held on March 8, 2013, and a prehearing order was issued on that date. Disclosures were filed by both parties on April 4, 2013. The hearing was convened at 810 First Street NE, Washington, D.C.

The hearing was closed to the public. The Hearing Officer Determination (HOD) is due May 1, 2013. This HOD is issued on April 24, 2013.

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

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-E30.

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) because it failed to provide the Student with special education services in conformity with his individualized education program (IEP) when it failed to deliver 19.5 hours of specialized instruction per week, outside of the general education setting, since the Student's enrollment at _____ ?
2. Whether the Respondent denied the Student a FAPE because it failed to review and revise the Student's IEP periodically, but not less than annually, when the IEP was last revised October 24, 2011?
3. Whether the Respondent failed to ensure a reevaluation of the Student occurred at least once every three years when the last reevaluation was conducted January 7, 2010?
4. Whether the Respondent denied the Student a FAPE because it failed to provide him an IEP reasonably calculated to enable the Student to be involved in and progress in the general education curriculum when his IEP lacks appropriate measurable postsecondary goals based on age appropriate transition assessments?

The Petitioner is seeking: implementation of the IEP; comprehensive psychological and comprehensive vocational/transition assessments; an IEP team meeting to revise the IEP based on the assessments; compensatory education to address the Student's lack of progress toward IEP goals and in the general education curriculum; and prospective placement at _____ a non-public special education day school in the District of Columbia.

The Respondent denied the Student a FAPE because it failed to provide the Student with special education services in conformity with his individualized education program (IEP) when it failed to deliver 19.5 hours of specialized instruction per week, outside of the general education setting, since the Student's enrollment at

The Respondent denied the Student a FAPE because it failed to review and revise the Student's IEP periodically, but not less than annually, when the IEP was last revised October 24, 2011. The IEP dated October 23, 2012, is virtually identical in all respects, but for several goals removed, and there was not an IEP team convened to review and revise the IEP subsequent to October 2011.

The Respondent failed to ensure a reevaluation of the Student occurred at least once every three years because the last two reevaluations conducted, March 5, 2013 and May 1, 2012, were reviews of existing data by a single person, and based only on a review of an October 2011 academic assessment and observations of the Student.

The Respondent denied the Student a FAPE because it failed to provide the Student an IEP reasonably calculated to enable him to be involved in and progress in the general education curriculum when his IEP lacks appropriate measurable postsecondary goals based on age appropriate transition assessments. The Student's post-secondary goals are not based on any particular transition assessment, merely the Student's stated desire for a future career made at one point a year and a half ago.

IV. EVIDENCE

Six witnesses testified at the hearing, five for the Petitioner and one for the Respondent. The Petitioner's witnesses were:

- 1) Petitioner, Student's Mother (P)
- 2) Mia Long, Advocate (M.L.)
- 3) Carrie Pecover, Seeds of Tomorrow Owner (C.P.)²
- 4) school Principal (E.H.)
- 5) Student (S)

The Respondent's witness was:

- 1) High School Special education teacher (S.B.)

23 of the Petitioner's 25 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. All 16 of the Respondent's 16 disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

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. The witnesses testified credibly except as noted. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a

² C.P. was offered as an expert in transition planning to provide an opinion on the Student's transition planning as reflected in his IEP. The witness was not accepted as an expert because while she had some knowledge of transition planning and services, she lacked the requisite specialized or technical knowledge concerning transition services for students with disabilities (she currently runs an education business for secondary school-age students, but her training and certification is in the area of early childhood special education. Further, she reviewed the Student's records, but had not met the Student prior to the date of hearing or conducted her own assessment of the Student. Finally, based on the testimony she provided at hearing, she recommended services for the Student, including assessment and compensatory education, that would directly benefit the witness and her company financially, rendering the entirety of her testimony suspect.

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 year old learner with a disability enrolled in the grade at School.³ The Student is eligible for special education and related services under the category of mental retardation (also known as intellectual disability).⁴
2. The Student is currently reading at the third grade level, is at the fourth grade level in mathematics, and third to fourth grade level in writing.⁵ The Student has limited functional skills, and there is no current comprehensive functional skills data to precisely determine his current functional skills level.⁶
3. The Student's IEP was last revised in October 2011.⁷ In October 2012, the Respondent invited the Petitioner to an IEP team meeting to be held on October 19, 2012, and then canceled the meeting, which was never held.⁸ The Respondent, through its representative to the IEP team, revised the IEP to reflect a meeting date of October 23, 2012, which was not attended by anyone (in fact, the two purported attendees, the agency representative, Deidra Whitehead, and a representative of another State Agency, both are listed as attending by phone) removed several goals, and otherwise left the IEP identical to the revision made in

³ P 10, Testimony (T) of P, T of S.

⁴ P 2, P 3/R 6.

⁵ P 6.

⁶ P 17, P 3/R 6, R 9. (P 17 is an informal assessment of the Student, and because this was both informal and created by the Student's Advocate, who is an employee of the Petitioner's attorney, it is given limited weight as evidence.)

⁷ P 2, P 3/R 6.

⁸ T of P, R 5, R 6.

October 2011.⁹ This unilateral IEP revision does not even include present levels of academic achievement and functional performance as they reflect the levels of academic achievement and functional performance from the prior year when the Student was at another school.¹⁰

4. The Student has had a series of assessments of his academic and functional performance over the years, with no comprehensive evaluation completed or documented in the last three years.¹¹ An academic assessment was completed by the Student's teacher on March 13, 2013.¹² This followed a review of an October 2011 academic assessment (Kaufman Test of Educational Achievement, Second Edition) by Whitehead on March 5, 2013, and previously on May 1, 2012.¹³ (Like the IEP, the March 5, 2013 review of existing data is merely a reproduction of the prior review of existing data made on May 1, 2012.) A psychological assessment was conducted by a charter school in January 2010, which only utilized the Weschler Individual Achievement Test – Second Edition, examining the Student's academic skills.¹⁴ The relatively most comprehensive assessment was made by an independent agency in March 2009, which included the use of Weschler Intelligence Scale for Children – Fourth Edition, and Vineland Adaptive Behavioral Scales completed only by a teacher, as well as review of then existing data.¹⁵
5. The Student's IEP requires, since at least October 2011, 19.5 hours per week of specialized instruction outside of the general education setting and 30 minutes per week of behavioral

⁹ P 2, P 3/R 6.

¹⁰ P 2, P 3/R 6.

¹¹ P 2, P 3/R 6, P 4, P 5, P 6, P 12/R 3, R 1, R 9.

¹² P 6.

¹³ R 9, P 12/R 3

¹⁴ P 5.

¹⁵ P 4.

support services outside of the general education setting.¹⁶ The IEP also requires the Student to be working toward a diploma.¹⁷

6. The behavioral support services were substantially provided during the 2012-2013 school year.¹⁸ The Student was not provided with 19.5 hours per week of specialized instruction outside of the of the general education setting as he was placed in general education classes with only a special education teacher in his first semester English class (English III) and his second semester math class (Geometry).¹⁹ The Respondent placed the Student in general education classes because it does not provide credits toward a diploma in its special education classes the Student would have been assigned to, and the Petitioner wanted the Student to earn credits toward his diploma.²⁰ The Petitioner was advised that the alternative would be the segregated special education setting, where the Student would not earn credits towards graduation.²¹ The Student is receiving approximately seven and a half hours of specialized instruction per week in the general education setting during the current school year.²²
7. The Respondent was not implementing the IEP during the 2011-2012 school year when the Student was at _____ School because credit could not be earned toward graduation for the time the Student was in special education classrooms.²³ The Student was moved from _____ to _____ near the end of the 2011-2012 school year for safety reasons,

¹⁶ P 2, P 3/R 6.

¹⁷ P 2, P 3/R 6.

¹⁸ R 10.

¹⁹ T of P, T of S, P 7, P 16, R 11.

²⁰ T of P, T of S.B. (S.B. testified, and the Respondent argued, that the Student was placed in all general education classes because the Petitioner insisted. In fact, the Petitioner insisted the IEP be implemented, which included earning credits for a diploma, which the Respondent's schools could or would not do in the segregated special education classes the IEP otherwise required.)

²¹ T of S.B., T of P.

²² P 16, R 11.

²³ T of S.B.

not so the IEP could be implemented.²⁴ The Respondent believed it was appropriate to deviate from the IEP while at _____ because it had done so during the prior school year at the Student’s prior school for the same reason.²⁵

8. The IEP also includes a “transition plan” which has not been revised since at least October 2011.²⁶ The post-secondary goals in this part of the IEP are based on a C.I.T.E. Learning Styles Assessment completed on October 19, 2011, a Work Interest Inventory, completed on October 19, 2011, and classroom observation conducted on October 19, 2011.²⁷ The data from the C.I.T.E. Learning Styles Assessment included in the IEP only notes scores, and no intelligible data.²⁸ The purpose of the C.I.T.E. Learning Styles Assessment is to determine how a student learns best.²⁹ The Work Interest Inventory showed the Student had interest in working in the following areas: caring and helping careers; service careers; sales; and physical work.³⁰ The Student had advised S.B. in 2011 that he wanted to become a professional basketball or football player, or attend college and become a police officer, so these were the post-secondary goals included in the IEP for the Student.³¹

9. The Student has earned two D grades (in English III and Intro Financial Svcs), one C- (in U.S. History/Geography), and one F (French I) so far this school year.³² The Student is currently taking English IV, Geometry, Army JROTC I, and Environmental Science.³³ He currently has 15 Carnegie Units toward graduation and requires an additional 10.5 more, in

²⁴ T of S.B., T of P, T of S.

²⁵ T of S.B., T of P.

²⁶ P 2, P 3/R 6.

²⁷ P 2, P 3/R 6. The purported 2012 revision to the IEP notes that these assessments were completed on both October 19, 2011 and October 19, 2012. The “revision” lists a different person who is presumably a “reviewer” of the 2011 assessments. This “reviewer,” listed as the Student’s special education teacher on the 2012 “revision” to the IEP, did not attend an IEP team meeting to discuss her “review.”

²⁸ P 2, P 3/R 6.

²⁹ T of S.B.

³⁰ P 2, P 3/R 6.

³¹ P 2, P 3/R 6, T of S.B.

³² R 12, P 10.

³³ R 12, P 10.

specific areas, as well as 100 hours of community service.³⁴ His current grade point average is 1.67.³⁵

10. The Student has been accepted at _____ School in Washington, D.C., for the current school year, but has not enrolled.³⁶ Pathways is a non-public special education day school for students with emotional disturbances and specific learning disabilities in grades nine through 12.³⁷ The school currently has 13 students, over a third of whom are very low functioning, in addition to their emotional disturbance.³⁸ Students at the school are provided with classes to earn a high school diploma, provided individual and group counseling to meet their emotional needs, and all teachers are special educators who provide instruction to students based on each student's current level of achievement.³⁹ The Principal at _____ believes the Student is a good fit with the current student body at the school.⁴⁰ While there are not currently other students with mental retardation at _____ the school has served such students in the past.⁴¹ The school works to help students transition back to the public school they came from or to another school in the _____ system.⁴² The school is certified by the Office of the State Superintendent of Education (OSSE).⁴³

11. The Petitioner presented a plan for compensatory education at hearing which does not indicate where the Student would have been academically and functionally but for the alleged violations.⁴⁴ M.L. did an informal assessment of the Student in March 2013, and

³⁴ R 13, P 11.

³⁵ R 13, P 11.

³⁶ P 15, T of E.H., T of P.

³⁷ T of E.H.

³⁸ T of E.H.

³⁹ T of E.H. (Of course, this is what is expected in public schools as well under IDEA.)

⁴⁰ T of E.H.

⁴¹ T of E.H.

⁴² T of E.H.

⁴³ T of E.H.

⁴⁴ P 14.

determined that the Student had regressed a grade level since October 2011, and opined that had the IEP been implemented, the Student would be at a third grade level in academics at this point in time.⁴⁵ The proposal is for: credit recovery for courses the Student does not pass this year; referral to and completion of the SEEDs of Tomorrow Reading and Math Bootcamp for the summer of 2013, or 160 hours of tutoring in reading, writing, and math; and 40 hours of vocational training by age 22.⁴⁶ The proposal does not indicate how these services will bridge the gap created by the harm resulting from the alleged violations.⁴⁷

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 a 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 –

⁴⁵ T of M.L.

⁴⁶ P 14.

⁴⁷ P 14.

- (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).

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, 275 (D.D.C. 2011), *citing*: Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”); *accord* S.S. ex rel. Shank v. Howard Road Acad., 585 F. Supp. 2d 56, 68 (D.D.C. 2008); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff’d sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007). “[T]he materiality standard *does not require that the child suffer demonstrable educational harm* in order to prevail” on a failure-to-implement claim. Wilson, at 275 (emphasis in original), *citing*: Van Duyn, 502 F.3d at 822 (emphasis added); *cf.* MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). “Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” Id., *See, e.g.*, Van Duyn, 502 F.3d at 822; S.S., 585 F. Supp. 2d at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

4. The Respondent materially deviated from the Student's IEP when it did not provide any specialized instruction outside of the general education setting during the 2012-2013 school year. Its justifications were not applicable. The Petitioner did not want the Student in special education classes at the expense of earning credit toward his diploma.⁴⁸ The IEP reflected that the Student would be working toward a diploma.⁴⁹ In this case, the Respondent, rather than providing the staff or the school to implement the IEP as written by the authority, the IEP team, simply ignored the IEP and gave the Student the option of the services called for in the IEP, or the opportunity to work toward a diploma, not both as the IEP (and IDEA) required. Also, the Respondent's position that it was simply doing as it had the prior school year does not justify the violation. Thus, the Student was denied a FAPE when special education services were not provided in conformity with his IEP during the 2012-2013 school year.
5. Federal Regulations at 34 C.F.R. § 300.320 require, in part, the following components in 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;

⁴⁸ "A student with special needs who does not achieve a diploma, as set forth in § 2203.4 shall be eligible to receive a Certificate of Individual Educational Program (IEP) completion. The decision to pursue a program leading to an IEP Certificate of Completion shall be made by the IEP team including the parent(s) and where possible, the student. The decision shall be made no earlier than the 9th grade and shall be attached in writing to the student's Individualized Education Program (IEP). DCPS shall comply with the Individuals with Disabilities Act, 2004 (IDEA) as addressed in DCMR, Title V, Chapter 30, with regards to appropriate transition assessments." D.C. Mun. Regs at § 5-E2203.6.

⁴⁹ If the IEP had been amended to reflect less special education services or a change in placement in order for the Student to be able to earn credits toward a diploma, the Respondent would likewise have been in violation of both IDEA and other applicable statutes disallowing discrimination based on disability.

6. Pursuant to 34 C.F.R. § 300.321(a), an IEP team must minimally include:

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child . . .;
- (3) Not less than one special education teacher of the child . . .;
- (4) A representative of the public agency who-
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction. . .;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the public agency.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section[.]

7. Pursuant to 34 C.F.R. § 300.324(b):

Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

- (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
- (ii) Revises the IEP, as appropriate, to address—
 - (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
 - (B) The results of any reevaluation conducted under § 300.303;
 - (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
 - (D) The child’s anticipated needs; or
 - (E) Other matters.

8. The Respondent invited the Petitioner to an IEP meeting in October 2012, and then cancelled the meeting. The Respondent did not convene a meeting but there may have been a phone call to a person at another agency. The Case Manager removed some of the goals and left the rest of the IEP unchanged. This resulted in a program that demonstrated no educational progress because the goals had not been met, included no statement of present levels of academic achievement and functional performance (statements from a year prior are not “present”), and was not reviewed and revised by an IEP team. Procedural violations can result in a determination of a denial of FAPE when the violations “(i) Impeded the child’s right to a FAPE; (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) Caused a deprivation of educational benefit.” 34 C.F.R. § 300.513(a)(2). In this case, all three of these items are met. First, the failure to address progress toward goals and, if

necessary, revise the goals to be new annual goals shows the Student did not make meaningful progress and was, therefore, denied a FAPE. Second, the Student's parent was simply not invited to a meeting and no meeting occurred. Yes, there had been an invite, but the meeting was cancelled and the IEP in the record inexplicably notes that there was a "meeting" on October 23, which no one attended. This appears to be an effort to put form over substance and pass it off as a meaningful educational program. Finally, because the IEP was not revised, the Student suffered a deprivation of educational benefit, because there was no additional progress to be made by the Student with his teachers over the prior year. The Student has significant academic and functional needs, and requires relatively intensive services to help him not only earn a diploma, but to be independently functional following graduation. For all these reasons, this violation denied the Student a FAPE.

9. Students with disabilities must be reevaluated in accordance with 34 C.F.R. §§ 300.304 through 300.311 under certain circumstances, including at least once every three years, unless the Respondent and parent agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303. *See also*, D.C. Mun. Regs. 5-E3005.7. 34 C.F.R. § 300.304 requires, in relevant part:

(b) In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

- (ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
 - (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
 - (iv) Are administered by trained and knowledgeable personnel; and
 - (v) Are administered in accordance with any instructions provided by the producer of the assessments.
- (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
 - (3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
 - (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities; . . .
 - (6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
 - (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

See also D.C. Mun. Regs. 5-E3005.9.

10. The Student was not, in the last three years, comprehensively evaluated to determine the content of his IEP and how to enable him to be involved in and progress in the general curriculum in accordance with 34 C.F.R. § 300.304 and D.C. Mun. Regs. 5-E3005.9. The last two evaluations were merely reviews of a single assessment, the KTEA, conducted in October 2011. An academic assessment was conducted this past March and was not even considered as part of a reevaluation. In no case has all of the various assessments conducted over the last three years been all considered in a reevaluation. A comprehensive reevaluation of the Student to enable the IEP team to make determinations about the Student's IEP and how to enable him to be involved in and progress in the general education curriculum must be conducted promptly.
11. "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.” 34 C.F.R. § 300.320(b)

Data must be collected on the child’s strengths, preferences, and interests. 34 C.F.R. § 300.43(a)(2). A functional vocational evaluation must be considered, if appropriate. Id.

12. The Student turned years of age in October 2011. His IEP was revised at that time and included a “transition plan.” The transition assessments upon which the postsecondary goals in the IEP were based were a learning style assessment, a work interest inventory, and a classroom observation and interview with the Student. These “assessments” were not, alone, appropriate for the Student because of his low cognitive skills and academic functioning. “[S]pecific transition assessments used to determine appropriate measurable postsecondary goals will depend on the individual needs of the child, and are, therefore, best left to States and districts to determine on an individual basis.” 71 Fed. Reg. 46666 (2006). The Student’s postsecondary goals were based primarily on the Student’s stated desire to become a professional athlete or a police officer. While these goals may or may not be appropriate, they are based only on the Student’s stated preference at one point in time and not on age-appropriate transition assessments that would more thoroughly help the IEP team determine the Student’s strengths and weaknesses and individual needs, thus providing a sound basis for appropriate achievable goal setting. Thus, he was not provided with an IEP that met the requirements of 34 C.F.R. § 300.320(b), and was denied a FAPE.

13. This hearing officer has broad discretion to 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). The Petitioner has requested several forms of relief for the violations found here. First, the Petitioner requests implementation of the IEP as written. This is reasonable given it is already statutorily required. Second, the Petitioner requests comprehensive psychological and comprehensive vocational/transition assessments. This, too, is reasonable given the lack of a recent comprehensive evaluation of the Student, including transition assessments that include a vocational evaluation due to the Student's lower cognitive functioning. Compensatory education and prospective placement are also requested. These two remedies are examined more closely, below.
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, 523, (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). The Petitioner has not clearly shown

where the Student would have been but for the denials of FAPE, and how her proposals for compensatory education would address the gap created. However, this should not bar the Student from a remedy that will ensure the denials of FAPE are addressed. Second the Petitioner not only seeks compensatory education, but also prospective placement. When considering prospective nonpublic placement as a remedy, the following factors must be considered: a) the nature and severity of the Student's disability; b) the Student's specialized educational needs; c) the link between those needs and the services offered by the private school; d) the reasonableness of the placement's cost; and e) the extent to which the placement represents the least restrictive environment. Branham v. District of Columbia, 427 F. 3d 7, 12, (D.C. Cir. 2005). In this case, it has not been shown that the Student requires a more restrictive non-public special education day school as prospective placement to ensure FAPE is provided in the future and the reasonableness of the cost cannot be determined because no evidence of cost was entered into the record, despite the Undersigned's question about this of the witness from [redacted].

The Respondent's implementation of the IEP will handle future provision of FAPE. However, the Respondent's implementation of the IEP will not compensate the Student for the denials of FAPE found here. To compensate the Student for the denial of FAPE resulting in a lack of progress in the general education curriculum, the Student will be provided the opportunity to make up any classes failed during the current school year. Thus far, the Student has only failed one semester of French. This, and any other failed classes, will be made up over the course of the summer of 2013, and will include the provision of specialized instruction in order to enable the Student to progress in French, and any other classes the Student fails. To compensate the Student for the failure to address his other needs, as reflected in the IEP, the Student will require more intensive services over the

course of a year to help him narrow the gap of where he currently is functionally and academically and where he needs to be to graduate. The Student made no progress on his IEP goals from one year to the next, thus, an award compensatory in nature is appropriate and the Petitioner will be permitted to enroll the Student at _____ if it remains willing and able to meet the Student's academic and functional needs over the course of the next school year. Reimbursement for the non-public school will be made directly to the non-public school and will not exceed OSSE published rates for public funding of non-public placements.⁵⁰

VII. DECISION

1. The Respondent denied the Student a FAPE because it failed to provide the Student with special education services in conformity with his individualized education program (IEP) when it failed to deliver 19.5 hours of specialized instruction per week, outside of the general education setting, since the Student's enrollment at _____ School.
2. The Respondent denied the Student a FAPE because it failed to review and revise the Student's IEP periodically, but not less than annually, when the IEP was last revised October 24, 2011. The IEP dated October 23, 2012, is virtually identical in all respects, but for several goals removed, and there was no IEP team convened to review and revise the IEP subsequent to October 2011.

⁵⁰ While it is not possible to determine exactly how much academic and functional growth the Student will make with this compensatory award, it is reasonable in light of the Student's needs and the Respondent's violations herein representing a disregard of the Student's and Petitioner's rights. Specifically egregious is the conduct of the Respondent in failing to comprehensively evaluate the Student, failing to invite the Petitioner to a meeting of the IEP to review and revise the IEP and also not revising the IEP while asserting it was, and its refusal to implement the IEP, despite moving the Student from one school to another and not locating a school that could implement the IEP. On the other hand, the Petitioner has presented limited evidence to make a more precise compensatory education plan, and, if the Pathways School decides not to accept the Student for the 2012-2013 school year, will receive only the portion of the compensatory education award for credit recovery.

3. The Respondent failed to ensure a reevaluation of the Student occurred at least once every three years because the last two reevaluations, conducted March 5, 2013 and May 1, 2012, were reviews of existing data by a single person and were based only on a review of an October 2011 academic assessment and observations of the Student.
4. The Respondent denied the Student a FAPE because it failed to provide him an IEP reasonably calculated to enable the Student to be involved in and progress in the general education curriculum when his IEP lacks appropriate measurable postsecondary goals based on age appropriate transition assessments. The Student's post-secondary goals are not based on any particular transition assessment, merely the Student's stated desire for a future career made at one point a year and a half ago.

VIII. ORDER

1. The Respondent will immediately begin implementing the Student's IEP as written, and no later than May 1, 2013. The services required include, but are not limited to, 19.5 hours of specialized instruction per week, outside of the general education setting, delivered by a special education teacher who has academic content certification, or by a team of special education and content certified co-teachers.
2. The Respondent will provide the Student a comprehensive psycho-educational evaluation, including a comprehensive transition assessment which includes, but is not limited to, a vocational evaluation. The evaluation and meeting to draft the evaluation report and revise the IEP will be completed and held no later than May 24, 2013. The IEP will be revised consistent with the evaluation data.

3. The Respondent will provide the Student with compensatory education to address the Student's lack of progress toward IEP goals and in the general education curriculum, consisting of: a) credit recovery over the summer of 2013, delivered by content and special education certified teachers, for the courses the Student fails to earn credit for during the 2012-2013 school year; and b) reimbursement for the Student's enrollment at School if that school accepts the Student for the 2012-2013 school year, with the reimbursement being provided directly to the non-public school and at a rate approved by OSSE.

IT IS SO ORDERED.

Date: April 24, 2013



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).