

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

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

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

Date Issued: May 2, 2012

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

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OSSE  
STUDENT HEARINGS OFFICE  
2012 MAY -2 PM 4: 22

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on February 17, 2012. A response to the complaint was filed February 29, 2012. The response was a general denial of the claims and did not include: the required explanation of why the Respondent proposed or refused to take the actions raised in the complaint; the other options the individualized education program (IEP) team considered and why those option were rejected; a description of each evaluation procedure, assessment, record, or report the Respondent used as the basis for the proposed or refused actions; nor a description of the other factors that were relevant to the Respondent's proposed or refused actions. Nor was a copy of the relevant prior written notice provided with or in lieu of the response.

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

A resolution meeting was to be convened on March 2, 2012. However, the Respondent did not ensure any members of the Student's IEP team were present and no agreements resulted from the purported resolution meeting. A prehearing was also convened on March 2, 2012, resulting in an order that, among other things, clarified the issues for hearing, the substantive relief requested, and rules to follow concerning evidence and prehearing motions.

Trial briefs were submitted on April 18, 2012. The Hearing was convened at 9:00 a.m. on April, 24, 2012, at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Respondent

only appeared through counsel (despite the order of the undersigned) :

The Hearing concluded approximately 7:10 p.m. The due date for this HOD is May 2, 2012. This HOD is issued on May 2, 2012.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

## **III. ISSUES, RELIEF SOUGHT, and DETERMINATION**

The issues to be determined by the IHO are:

- (1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when the IEP proposed in January 2012: lacked a statement of the Student's present levels of academic achievement and functional performance; included academic goals not designed to meet the Student's needs because they are unattainable; and included functional goals that are not measurable?

- (2) Whether the Respondent denied the Student a FAPE when it failed to provide the Student with speech and language services and counseling in conformity with her IEP during the 2011-2012 school year?
- (3) Whether the Respondent denied the Student a FAPE when it failed to conduct an appropriate transition assessment for the Student?
- (4) Whether the Respondent failed to place the Student in the least restrictive environment (LRE) appropriate for the Student when it refused to place the Student in a more restrictive setting?

Another issue was to be heard: Whether the Respondent failed to conduct a transition assessment requested by the Petitioner? The parties advised the IHO that the Respondent had authorized the requested transition assessment. Over the Petitioner's objection, the IHO removed this issue from consideration because the relief to address the claim, if proven, had been provided, and so the issue was moot. The related issue of whether the Respondent denied the Student a FAPE for not conducting an appropriate transition assessment (which could lead to other remedies to address the alleged denial) remained for hearing.

The substantive requested relief remaining included:

- (1) Compensatory education consisting of Lindamood-Bell reading services for at least 120 hours over the summer, and 120 hours of individual tutoring in the areas of math, reading, and writing during the 2012-13 school year for three hours per week.
- (2) Revisions to the IEP including: a revised statement of the Student's present levels of academic achievement and functional performance that include baseline data from which to measure progress; measurable appropriate academic and functional goals; 26 hours per week of specialized instruction outside of the general education setting; one hour per week of speech and language services out of the general education setting, and 30 minutes per week of behavioral support services out of the general education setting.<sup>2</sup>

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<sup>2</sup> Petitioner had sought an IEP team meeting to revise the IEP. The IHO pointed out at the prehearing that an IEP team meeting already occurred and resulted in the present dispute. Therefore, the Petitioner must be prepared to show what she thinks the IEP must include in order to provide the Student with an appropriate education.

- (3) Placement at \_\_\_\_\_ a “full-time” special education school for children with attention deficit hyperactivity disorder (ADHD) and learning disabilities for the remainder of the 2011-2012 school year.<sup>3</sup>

The Student’s IEP lacks an accurate statement of her present levels of functional performance in speech and language at the time it was revised in January 2012. Four of the 16 academic goals in the IEP are not measurable. The remainder are appropriate to meet the Student’s needs and enable her to eventually be involved in and progress in the general education curriculum. One of the Student’s functional goals are measurable, one is not, and three are not able to be evaluated because the IEP lacks an accurate statement of the Student’s present levels of functional performance in speech and language (the area for which the goals in question were designed.)

The Respondent did not provide the Student with speech and language services and counseling services in conformity with her IEP.

The Respondent did not conduct an age appropriate transition assessment before it revised the IEP in January 2012.

The Respondent failed to place the Student in the LRE appropriate for her when it refused to place her in a more restrictive setting.

#### **IV. EVIDENCE**

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

- 1) Kevin Carter, Special Education Advocate, James E. Brown & Associates (K.C.)
- 2) The Student’s Grandmother, Petitioner (P)
- 3) \_\_\_\_\_ Administrative Head of \_\_\_\_\_

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<sup>3</sup> It is unclear why the Petitioner only wanted the Student placed here for the remainder of the school year.

4) Chithalina Khanchalern, Educational Advocate, James E. Brown & Associates (C.K.)

5) Student (S)

The Respondent's witness was Kripal Singh, Speech Language Pathologist,

The Respondent sought to have additional witnesses testify via telephone.

Pursuant to the notice of the prehearing and prehearing order, telephone testimony was prohibited due to various reasons including, but not limited to, common problems with device functionality and clarity, witness access to documents, and difficulty determining witness credibility. Telephone testimony would be permitted if timely requested and good cause shown. No request was made until the day of hearing and no evidence of good cause was provided (although it was argued).

27 exhibits were admitted into evidence of 26 disclosures from the Petitioner.<sup>4</sup> The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	April 16, 2012	[Student] IEP GOALS
P 2	April 12, 2012	[Student] COMPENSATORY EDUCATION PLAN
P 3	January 19, 2012	Student Schedule
	January 23, 2012	Student Timetable (BV)
P 4	December 6, 2011	Transcript
	December 6, 2011	Letter of Understanding
	December 6, 2011	Email chain ending from Khanchalern to Hecht, et al.
P 5	January 10, 2012	Attendance Summary
P 6	January 9, 2012	Email from Kessler to Mitchell
P 7	March 2, 2012	Letter from Chapman to [Petitioner] (See R 15)
P 8	September 27, 2011	Email chain ending from Dalton to Khanchalern, et al.
	November 8, 2011	Letter from Wendorf to Wright
	September 24, 2010	Parental/Guardian Consent to Evaluate
	November 8, 2011	Email chain ending from Wendorf to Wright
	November 9, 2011	Email chain ending from Mitchell to Khanchalern
	December 7, 2011	Email from Mitchell to Khanchalern
	December 9, 2011	Email chain ending from Mitchell to Khanchalern
	December 13, 2011	Email chain ending from Khanchalern to Mitchell
	December 20, 2011	Email chain ending from Mitchell to Khanchalern

<sup>4</sup> One item, P 27, was part of a set of disclosures the Respondent decided not to use, and the Petitioner moved for its introduction into the record.

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 8 (cont.)	January 13, 2012	Email from Wright to Khanchalern
	January 13, 2012	Email chain ending from Carter to Khanchalern
	January 13, 2012	Email from Wright to Khanchalern
	January 20, 2012	Email from Khanchalern to Wright, et al.
P 9	January 20, 2012	Letter from Khanchalern to Wright
P 10	January 17, 2012	Letter from Carter to Wright
P 11	January 10, 2012	IEP
P 12	January 10, 2012	IEP (Draft)
P 13	January 10, 2012	Advocate's Notes
P 14	January 10, 2012	[Meeting Notes]
P 15	January 10, 2012	Meeting Notes [Student]
P 16	December 6, 2011	Advocate's Notes
P 17	December 6, 2011	30 Day Review For [Student]
P 18	August 10, 2011	Evaluation Summary Report (See R 7)
P 19	August 10, 2011	IEP (See R 7)
P 20	May 9, 2011	IEP
P 21	August 2, 2011	Speech-Language Initial Evaluation Report (See R 3)
P 22	August 1, 2011	Clinical Evaluation (See R 2)
P 23	April 9, 2011	Psychoeducational Evaluation
P 24	December 3, 2010	Intervention Behavior Plan
	Undated	Functional Behavior Assessment
P 25	March 20, 2009	Psychoeducational and Clinical Evaluation
P 26	April 16, 2012	Letter from Anyanwu to [Petitioner]
P 27	October 28, 2011	IEP Progress Report – Annual Goals

15 exhibits were admitted into evidence of the Respondent's 17 final disclosures. (The Respondent actually disclosed several sets of documents, most overlapping, due to organizational problems in the Office of General Counsel. The Petitioner raised concerns about the disclosed documents that were unfounded because all the documents ultimately relied on were timely disclosed. The two documents Petitioner objected to at the start of the hearing were not later moved for entry into the record.) The Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	July 12, 2011	Resolution Agreement
R 2	August 1, 2011	Clinical Evaluation (See P 22)
R 3	August 2, 2011	Speech-Language Initial Evaluation Report (See P 21)
R 5	August 10, 2011	Final Eligibility Determination Report
R 7	August 10, 2011	Evaluation Summary Report (See P 18)
	August 10, 2011	IEP (See P 19)

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 8	January 10, 2012	IEP (only first page)
R 9	January 20, 2012	IEP Progress Report – Annual Goals
R 10	March 2, 2012	Resolution Meeting Notes
R 11	September 8, 2011	Service Tracker
	November 4, 2011	Service Tracker
	December 5, 2011	Service Tracker
R 11	January 4, 2012	Service Tracker
	March 25, 2012	Service Tracker
	April 4, 2012	Service Tracker
	April 5, 2012	Service Tracker
R 12	Undated	Untitled [Functional Behavioral Assessment]
R 13	March 27, 2012	Untitled [Behavior Intervention Plan]
R 14	April 17, 2012	Service Tracker
R 15	March 2, 2012	Letter from Chapman to [Petitioner] (see P 7)
R 16	March 30, 2012	Report to Parents on Student Progress
R 17	April 20, 2012	Attendance Summary

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. To the extent the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

#### **V. FINDINGS OF FACT**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a     year old learner with a disability repeating the     grade at  

She enrolled there sometime in September 2011 after the Petitioner removed

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<sup>5</sup> R 2/P 22, P 4, P 11.

her from a charter school.<sup>6</sup> The Student has been determined eligible for special education and related services under the definition of multiple disabilities.<sup>7</sup> The Student has been diagnosed with Attention Deficit-Hyperactivity Disorder and a language delay.<sup>8</sup>

2. The Student's needs are both academic and functional in nature. She is below grade level in reading, writing, and mathematics, despite the provision of special education and related services.<sup>9</sup> As a result of her poor academic performance, she becomes frustrated in class and then disrupts the class.<sup>10</sup> It is not clear that she continues to avoid class, but this was the case during the prior school year.<sup>11</sup>
3. The Student's prior school did not permit her to take the State-wide academic assessment, the DC-CAS and no DC-CAS performance data was entered into the record.<sup>12</sup> Her current grades do not accurately reflect her performance or knowledge of the general education curriculum standards.<sup>13</sup>
4. The revision of the Student's IEP complained of was formulated on January 10, 2012.<sup>14</sup> No progress was made on any of the Student's IEP goals prior to the revision, so the statement of the Student's present levels of academic achievement and functional performance did not change from the last revision on August 7, 2011.<sup>15</sup> The statement of the Student's present levels of academic achievement and functional performance included data from at least three

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<sup>6</sup> P 8, Testimony (T) of K.C.

<sup>7</sup> R 5.

<sup>8</sup> R 2/P 22, R 3/P 21.

<sup>9</sup> P 18, P 23, R 5.

<sup>10</sup> R 7, R 12, T of K.C.

<sup>11</sup> R 7, R 12. (R 17 was introduced to support Respondent's argument that the Student has poor attendance this year. The Petitioner (P) and Student (S) both testified credibly that the Student's attendance this year has not been what is reflected in R 17. However, even if the Student's attendance this year has been problematic, the evidence shows such behavior is related to her frustration in classes that are at her age level, but not her level of academic achievement, which would provide additional support for the Petitioner's claims.)

<sup>12</sup> T of S.

<sup>13</sup> R 16, T of C.K. (C.K. testified that the Student's grades, largely C's and D's, are "fluffed" – based on relative performance, not standards-based performance.)

<sup>14</sup> P 11.

<sup>15</sup> R 7/P 19, P 11, P 27. (This revision was made at the Charter School.)

assessments completed in 2011: a speech and language assessment, a clinical assessment, and a psychoeducational assessment.<sup>16</sup> The statement of the Student's present levels of academic achievement and functional performance did not include the following pertinent information on how the Student's disability affects her involvement and progress in the general education curriculum: problems with comparing and contrasting words for shared and non-shared features; problems focusing on spoken material; and difficulty interpreting relationships presented orally and in text (although the goals under "Communication/Speech and Language" appear to address this deficit).<sup>17</sup>

5. The Student's IEP includes four math goals that are based on fourth grade standards (Goal 4, e.g. 4.NSO-C.15), sixth grade standards (Goal 3, e.g. 6.NSO-C.12), seventh grade standards (Goal 1, e.g. 7.PRA.6), and eighth grade standards (Goal 2, e.g. 8.PRA.7).<sup>18</sup> The Student's performance level in math at the time the IEP was revised was at the third grade level.<sup>19</sup>
6. The Student's IEP includes seven reading goals.<sup>20</sup> Goals five, six and seven are not measurable because they apply to skills that are addressed throughout the reading curriculum at different grades and the particular grade level to achieve is not identified.<sup>21</sup> The remaining goals are based on third grade standards (Goal 3, e.g. 3.IT-E.2), sixth grade standards (Goals 2 and 4, e.g. 6.IT-E.1, 6.LD-V.8), and seventh grade standards (Goal 1, e.g. 7.LT-F.5).<sup>22</sup> The

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<sup>16</sup> P 11, P 21/R 3, P 22/R 2, P 23.

<sup>17</sup> P 11, P 21/R 3. (It is also noted that the Respondent did not have the speech and language pathologist at the IEP meeting in January, which may explain why the statements in this area do not accurately or completely reflect the evaluation data.)

<sup>18</sup> P 11. (The citations are to the mathematics standards for the District of Columbia. C.K. testified the standards were at the 9<sup>th</sup> grade level and some elementary level. Based on independent review, this is not entirely accurate and none of the goals appear to be based on 9<sup>th</sup> grade standards.)

<sup>19</sup> P 11.

<sup>20</sup> P 11.

<sup>21</sup> P 11.

<sup>22</sup> P 11. (The citations are to the Reading/English Arts standards for the District of Columbia.)

Student's performance level in reading at the time the IEP was revised was at the third grade level.<sup>23</sup>

7. The Student's IEP includes five written expression goals.<sup>24</sup> One of the goals, Goal 4, is not measurable because it encompasses standards from multiple grade levels and does not specify the grade level standard to be met.<sup>25</sup> The remaining goals are based on second grade writing standards (Goal 3, e.g. 2.EL.1 - 2.EL.6), fourth grade standards (Goal 1, e.g. 4.W-E.3), fifth grade standards (Goal 2, e.g. 5.W-E.3), and seventh grade standards (Goal 5, e.g. 7.W-E.2).<sup>26</sup> The Student's performance level in written expression at the time the IEP was revised was at the second grade level.<sup>27</sup>
8. The Student's IEP includes five functional goals: three in the communication/speech and language area, and two in the emotional, social, and behavioral development area.<sup>28</sup> Due to the data missing from the statement of present level of functional performance concerning this skill area, the speech and language goals cannot be accurately assessed.<sup>29</sup> Of the two emotional, social, and behavioral development goals, the first ("Given a stress-provoking situation, [Student] will utilize effective coping strategies. . . .") is measurable.<sup>30</sup> The second goal ("Student will learn problem solving techniques to avoid conflict with peers and adults.") is vague and not measurable because no techniques are specified, nor precisely how this goal will be measured.<sup>31</sup>

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<sup>23</sup> P 11.

<sup>24</sup> P 11.

<sup>25</sup> P 11.

<sup>26</sup> P 11. (The citations are to the Reading/English Arts standards, in which writing is incorporated, for the District of Columbia. C.K. testified that the second and third writing goals are based on sixth and first grade standards, respectively. Based on independent review, this is not accurate.)

<sup>27</sup> P 11.

<sup>28</sup> P 11.

<sup>29</sup> See FF #4, *supra*, and P 11.

<sup>30</sup> P 11.

<sup>31</sup> P 11.

9. The Student's IEP has required one hour per week of speech and language services during her time enrolled at her current school.<sup>32</sup> The total number of hours of speech and language she was entitled from the time she enrolled (assuming it was the final week of September) to the time the complaint was filed is 20 hours.<sup>33</sup> The total number of hours of speech and language she was entitled from the time the complaint was filed to when the hearing was held was eight hours.<sup>34</sup> The Student was provided six hours of speech and language services since she began at her current school.<sup>35</sup> The Student was absent or suspended for nine hours she was otherwise entitled to receive speech and language services.<sup>36</sup> The Student, at the time of the hearing, was denied 13 hours of speech and language services of the 28 she was entitled to.<sup>37</sup>
10. The Student's IEP has required 30 minutes per week of behavioral support services since she was enrolled at her current school.<sup>38</sup> The total number of behavioral support services the Student was entitled to since she enrolled until the complaint was filed was 10 hours.<sup>39</sup> The total number of behavioral support services the Student was entitled to since the complaint was filed until the hearing was four hours.<sup>40</sup> The Student has not seen anyone for behavioral support services since January 6, 2012.<sup>41</sup> Prior to that the services were sporadic.<sup>42</sup> The

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<sup>32</sup> R 7/P 19, P 11.

<sup>33</sup> R 7/P 19, P 11. (Administrative notice is taken of the Respondent's school calendar for all purposes of calculating service/instructional time. The last week of September is assumed because the record shows the Student was enrolled at the new school at least during that week, but Petitioner did not show exactly when the Student began attending her new school.)

<sup>34</sup> P 11.

<sup>35</sup> R 11, T of K.S., T of S.

<sup>36</sup> R 11, T of K.S. (Times when the Student was unavailable for reasons she was not in control of are not counted, such as school field trips or class activities.)

<sup>37</sup> R 11, T of K.S.

<sup>38</sup> R 7/P 19, P 11.

<sup>39</sup> R 7/P 19, P 11.

<sup>40</sup> P 11.

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

<sup>42</sup> T of S.

Student, at the time of the hearing, was denied at least five to six hours of the 14 hours of behavioral support services she was to be provided.<sup>43</sup>

11. At a January 10, 2012 IEP team meeting, transition was briefly discussed at the end of the meeting.<sup>44</sup> The Respondent proposed conducting a transition screening using an interest inventory, and the Petitioner wanted a vocational assessment completed.<sup>45</sup> A partial interest inventory, the Brigance, was conducted with the Student on January 13, 2012.<sup>46</sup> Subsequently, on March 2, 2012, the Respondent authorized an independent vocational assessment to be completed, but no evidence of this assessment is in the record.<sup>47</sup> The Respondent's interest inventory consisted of questions about what the Student wanted to do after graduating from high school.<sup>48</sup>
12. A transition "plan" was added to the IEP following the IEP team meeting on January 10, 2012.<sup>49</sup> The "plan" only includes one post-secondary goal, no services, and no courses of study.<sup>50</sup>
13. The Student's IEP requires 19.5 hours of specialized instruction per week within the general education setting, 6.5 hours of specialized instruction per week outside of the general education setting, one hour per week of speech and language services outside of the general education setting, and 30 minutes per week of behavioral support services in the general

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<sup>43</sup> T of S. (It is impossible to be precise because no evidence of the exact time provided or missed was introduced into the record. This finding is based on the testimony of the Student, and a determination that the sporadic provision of service, described by the Student as "once in a blue moon," was partially attributable to absences that are documented for speech and language services, and is thus a reasonable guess.)

<sup>44</sup> P 13, P 15.

<sup>45</sup> T of C.K., P 9, P 13.

<sup>46</sup> T of S, P 11.

<sup>47</sup> P 7/ R 15.

<sup>48</sup> T of S, T of C.K. (No documentary evidence of this screening tool was provided.)

<sup>49</sup> P 11.

<sup>50</sup> P 11.

education setting.<sup>51</sup> Prior to January 2012, the IEP required the same but for the specialized instruction being for 16.5 hours per week in the general education setting and none outside of the general education setting.<sup>52</sup> The Respondent proposed increasing behavioral support services to one hour per week, and the Petitioner rejected this increase.<sup>53</sup>

14. No prior written notice was provided to the Petitioner addressing the Respondent's proposals and refusals following the January 10, 2012, IEP team meeting.<sup>54</sup> Following the IEP team meeting, notes of the meeting were provided to the Petitioner, which reflect a lack of explanation for most of the proposals or refusals or descriptions of the data upon which the proposals or refusals are based.<sup>55</sup>

15. The Student's significant academic deficits (working on elementary school level material) and her resulting frustration and embarrassment in classes with her non-disabled peers requires a more restrictive setting than the Respondent proposed in January 2012 (and then provided without prior written notice and despite the Petitioner's objection) where she is free from the emotional strain of requiring substantial remediation and special education services, and can be provided with those services to enable her to get caught up in the general education curriculum so that she can graduate with a diploma before she ages out of secondary school (In short, the Student is not prepared for secondary school and requires an elementary school education.)<sup>56</sup> The Student was often removed from class by at least one of her teachers for repeatedly asking for help with the material.<sup>57</sup>

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<sup>51</sup> P 11.

<sup>52</sup> R 7/P 19.

<sup>53</sup> P 13, P 15, T of K.C.

<sup>54</sup> No prior written notices, a fundamental due process document, was introduced by either party, nor included in the response to the complaint.

<sup>55</sup> P 15. (See also P 13 and P 14 which contemporaneously document the discussion at the IEP team meeting.)

<sup>56</sup> T of K.C., T of C.K., T of S., P 6, P 9, P 10, P 11, P 13, P 14, P 15,

<sup>57</sup> T of S, T of P.

16. The Petitioner seeks prospective placement of the Student at \_\_\_\_\_, a non-public special education day school.<sup>58</sup> \_\_\_\_\_ is a school for children who have a primary disability of a learning disability, as well as other health impairments and speech and language problems.<sup>59</sup> The School serves both elementary age and secondary age children.<sup>60</sup> Teachers are both special educators and have at least one content area certification.<sup>61</sup> The District of Columbia educational standards are followed at the school and it has a certification from the Office of the State Superintendent of Education for the District of Columbia.<sup>62</sup> Other students from the District of Columbia are enrolled and transported there (the school is in Lanham, MD).<sup>63</sup> There are several different reading and math programs used by teachers to provide specialized instruction to students.<sup>64</sup> Related services and transition services are also available to students.<sup>65</sup> All students are able to work toward a diploma.<sup>66</sup> The cost of the school is \_\_\_\_\_ per year and \_\_\_\_\_ per hour for related services provided to students.<sup>67</sup>

17. The Student has been accepted to attend \_\_\_\_\_ although she has not yet been enrolled there.<sup>68</sup> Her academic deficits can be addressed at \_\_\_\_\_ although it may take additional time.<sup>69</sup> The Student's behavioral issues can also be addressed at \_\_\_\_\_

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<sup>58</sup> T of P, T of C.A., P 26.

<sup>59</sup> T of C.A.

<sup>60</sup> T of C.A.

<sup>61</sup> T of C.A.

<sup>62</sup> T of C.A.

<sup>63</sup> T of C.A.

<sup>64</sup> T of C.A.

<sup>65</sup> T of C.A.

<sup>66</sup> T of C.A.

<sup>67</sup> T of C.A.

<sup>68</sup> T of C.A., P 26

<sup>69</sup> T of C.A.

<sup>70</sup> T of C.A.

## VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

3. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). Involvement and progress in the general 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). 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” or “educational benefit” ensured 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.

4. Federal regulations at 34 C.F.R. § 300.320 lists the required contents of an IEP:

- (a)(1) A statement of the child’s present levels of academic achievement and functional performance, including—
  - (i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
  - (ii) For preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities;
- (2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
  - (A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
  - (B) Meet each of the child’s other educational needs that result from the child’s disability;
- (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- (3) A description of— (i) How the child’s progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
- (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;

(6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and

(ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—

(A) The child cannot participate in the regular assessment; and

(B) The particular alternate assessment selected is appropriate for the child; and

(7) The projected date for the beginning of the services and modifications described in paragraph

(a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

(b) Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include —

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

5. The statement of the Student's present levels of academic achievement and functional performance was not complete in the IEP revised January 10, 2012. Without a complete statement, the formulation of appropriate goals to meet all of the Student's needs is not possible. In this case, the lack of a complete statement of present levels of functional performance in the area of communication led to goals that cannot be accurately evaluated or linked to the Student's needs. Thus, the failure to include an accurate statement of present levels of functional performance led to a failure to include measurable annual functional goals to address the Student's needs in speech and language. Speech and language, of course, is critical to learning in general, and given the Student's significant academic deficits, the cascading failure would directly hamper academic growth. The IEP was not reasonably calculated to provide the Student with educational benefit because it lacked a complete

statement of her present level of functional performance when the IEP was revised in January 2012.

6. Four of 16 academic goals (25%) in the January 2012 revision to the IEP are not measurable.

On that basis alone the IEP is not reasonably calculated to provide educational benefit. The majority of the remaining goals were based on elementary school education standards, and the others on seventh and eighth grade standards. Given the Student's age (16, nearly 17) and that she has been promoted to the 9<sup>th</sup> grade (even though she is repeating it this year) one would expect her to be working on secondary school or on or near ninth grade standards. Because the Student is not working on 9<sup>th</sup> grade standards, she has a considerable amount of catching up to accomplish. The measurable goals were reasonable, given the Student's performance level, but should have been set to a shorter time period than a year, so that once achieved, they could be revised to continue to help close the gap between the Student's current level of academic achievement and the level she should be at. Alternatively, the goals could have been more aggressive (e.g. all secondary school standards) and the Respondent would have still been responsible for ensuring all of the elementary skills required to meet those goals were taught to the Student to help her reach the goals. Given that the IEP is not reasonably calculated to provide educational benefit on other grounds, it is not concluded that the measurable academic goals were not appropriate, despite the low trajectory they provide to closing the Student's achievement gap between her current academic achievement and the curriculum standards her non-disabled peers are working on.

7. In addition to the lack of measurable functional goals in the area of communication due to the incomplete statement of present levels of functional performance, one of two behavioral goals is not measurable, and so is not appropriate. Thus, based on the majority of functional

goals not being appropriate, the IEP is not reasonably calculated to provide educational benefit and denied the Student a FAPE.

8. 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.
9. In this case the Respondent materially deviated from the Student’s IEP when it did not provide nearly half of the proscribed speech and language services and approximately one

third of the proscribed behavioral support services to the Student. Thus, these related services were not provided in conformity with the IEP and resulted in a denial of FAPE.

10. Post-secondary goals are to be based on an age appropriate transition assessment related to training, education, employment, and where appropriate, independent living skills. 34 C.F.R. § 300.320(b)(1). 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.
11. The Respondent authorized a vocational evaluation after the IEP was revised in January 2012. Even the interest inventory the Respondent did (the results of which are not in the record) occurred following the IEP revision. Given the IEP for a secondary student is to be based on the post-secondary goals identified, the entire IEP is suspect because of the lack of post-secondary goals based on an age-appropriate transition assessment. (*See*, 34 C.F.R. § 300.1(a).) In fact, a "post-secondary transition plan" was added to the IEP following the January 2012 IEP team meeting and the date the IEP was to go into effect (January 10, 2012). Again, no evidence of a prior written notice was provided and the transition "plan" was not formulated by the IEP team, denying the Petitioner or Student to opportunity to participate in its development. In fact, the purported transition "plan" is not a plan at all as there is no coordinated set of services, no courses of study the Student is to take, nor more than one post-secondary goal. This is a significant violation of the Petitioner's due process rights as well as rendering the IEP not reasonably calculated to provide educational benefit, all a denial of FAPE. *See*, 34 C.F.R. §§ 300.320, 300.321, 300.322, 300.513(a)(2).
12. Placement "refers to the provision of special education and related services rather than a specific classroom of specific school." 71 Fed. Reg. 46687 (August 14, 2006). Students must

be educated with non-disabled peers to the maximum extent appropriate and special classes separate schooling, or other removals of children with disabilities may occur only if the nature or severity of the Student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved. 34 C.F.R. § 300.114(a)(2).

13. The nature of the Student's disability, including the resulting embarrassment of being so far behind her peers and subjected to ridicule from students and repeated removals by at least one teacher, made education in regular classes untenable for the Student. The Respondent's proposal (which was not duly noticed to the Petitioner pursuant to 34 C.F.R. § 300.503) to increase specialized instruction in the general education setting by three hours, and add 6.5 hours of specialized instruction was not sufficient to address the Student's needs for significant remediation and aggravation of her social/emotional/behavioral needs by her low academic achievement.
14. 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.3<sup>rd</sup> 516, 523, 43 IDELR 32, (p 5, p 6) (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing

officer must undertake ‘a fact-specific exercise of discretion’ designed to identify those services that will compensate the student for that denial.” Id., *citing Reid*, 401 F.3d at 524; *see Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010). 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, 44 IDELR 149, \_\_\_ (pdf pg. 5) (D.C. Cir. 2005). “Because placement decisions implicate equitable considerations, moreover, courts may also consider the parties’ conduct.” Id., *citing Reid v. District of Columbia*, 401 F.3d 516, 524, 43 IDELR 32, \_\_\_ (D.C. Cir. 2005).

15. Given all of the factors in this case including, but not limited to, the Student’s present level of academic achievement, the Student’s current functional performance, and the performance of the Respondent in delivering related services and developing an IEP and placement for the Student, the appropriate remedy to put the Student where she would have been but for the numerous denials of FAPE is to place her at the non-public special education school at which she has been accepted, Compensatory education consisting of additional services to what she is already receiving will not be sufficient or appropriate to deliver FAPE to the Student. While the Student is not severely disabled, the nature of her disability and her current academic achievement require an educational setting where she can work on significant remediation to enable her to be involved in and progress in the general

education curriculum.            can address the Student's needs for remediation which will assist her functioning because of the change in environment which, based on the Student's significant gap in academic achievement, is the least restrictive environment for her. The cost of            is not unreasonable and no evidence that it is has been provided.

#### **VII. DECISION**

The Petitioner prevails on all issues.

#### **VIII. ORDER**

1. The Student shall be immediately placed at            at public expense and may remain there until            refuses to permit her to attend, Petitioner removes her, or she graduates from            with a high school diploma, whichever occurs first.
2. This placement will be treated as a parental placement for purposes of this order, and reimbursement for the placement will be provided directly to            No public supervision is necessary as long as the Petitioner believes the Student is receiving an appropriate education from            is advised to bill the Respondent directly for the cost of the Student's education, including related services. Respondent must reimburse            within 30 days of receipt of an itemized bill.
3. Because this placement is required as a result of the Respondent's denial of FAPE to the Student, the Respondent will also reimburse the Petitioner for the cost of transporting the Student to            This cost may be reimbursed directly to the Petitioner upon showing of verifiable receipts for transportation services including, if transportation is provided by

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<sup>71</sup> See, Mr. and Mrs. A. v. New York City Dept. of Ed., 769 F. Supp. 2d 403, 429 (S.D.N.Y. 2011). See also, Florence County School District Four v. Carter, 510 U.S. 7, 13, 114 S.Ct. 361, 365 (1993) "These requirements [e.g. public supervision] do not make sense in the context of a parental placement." Public supervision does not make sense in the present case because of the significant failures the Respondent made in revising the IEP, including conducting and developing a plan for transition of the Student, and delivering services to the student.

public service (i.e. Metro) a demonstration of the cost of a daily ride to and from the Student's home to [redacted] and attendance records showing the days the Student was at [redacted]. Reimbursement must be made to the Petitioner within 10 days of verifiable reimbursement requests. If the Respondent proposes to provide timely daily transportation directly for the Student, no reimbursement to the Petitioner will be required.

**IT IS SO ORDERED.**

Date: May 2, 2012



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Jim Mortenson, 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).