

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

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

[Parent], on behalf of
[Student],¹

Date Issued: December 15, 2011

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2011 DEC 15 PM 4:23

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on October 11, 2011.

A

response to the complaint was filed on October 21, 2011.

A prehearing conference was held on October 28, 2011 and a prehearing order was issued on that date. The complaint included allegations against which the Student had left prior to the filing of the complaint. After discussion, the IHO dismissed PCS as a party because it is no longer responsible for providing the Student a free appropriate public education (FAPE) and because DCPS is currently responsible for providing

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

FAPE.² The IHO pointed out that even assuming PCS denied the Student a FAPE, DCPS was now responsible for FAPE. Because there is no particular educational outcome to which the Student is entitled, and because compensatory education is a possible remedy, not *the* remedy, for a denial of FAPE, to require both LEAs in this case to provide FAPE would be redundant. As the Court in C.N. pointed out, “the hearing process is in place to ensure that a ‘disabled child’s educational needs are being met by the student’s school district.’ 144 F.3d at 578. After all, “[t]he purpose of requesting a due process hearing is to challenge an aspect of a child’s education and to put the school district on notice of a perceived problem. Once the school district receives notice, it has the opportunity to address the alleged problem.” [M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 460 (8th Cir. 2008)](quoting Thompson, 144 F.3d at 579).” The IHO pointed out that IDEA does not create a cause of action for a tort, but rather is to ensure that a child with a disability is provided a FAPE, that there are not different levels of a FAPE, and that the Student is either currently receiving a FAPE or is not, regardless of the reasons therefore. DCPS objected to the dismissal of PCS as a party.

Resolution meetings were purportedly convened and held on October 27 and November 3, 2011. No agreements were reached and the 45 day hearing timeline began on November 10, 2011.

The due process hearing was convened and held on December 5, 2011, in room 2003 at 810 First Street NE, Washington, D.C. The due date for this HOD is December 25, 2011. This HOD is issued on December 15, 2011.

² The Student is no longer an “LEA child” of the PCS following his enrollment in the DCPS school and therefore his Parent does not have a right to a hearing against PCS at this time. D.C. Mun. Regs. tit. 5, § 3029.1. *See also: C.N. v. ISD 347*, 591 F.3d 624, ___, 53 IDELR 251, ___ (8th Cir. 2010), *citing Thompson v. SSD No. 1*, 144 F.3d 574 (8th Cir. 1998), (Complaint dismissed against local education agency (LEA) where student was no longer enrolled and new LEA was responsible for provision of FAPE to the student.)

II. JURISDICTION

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

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) are:

- (1) Whether the Respondent denied the Student a FAPE when it did not provide special education and related services to the Student in conformity with his individualized education program (IEP) since the start of the 2011-2012 school year?
- (2) Whether the Respondent denied the Student a FAPE when failed to offer or provide the Student an IEP reasonably calculated to provide educational benefit when the IEP lacked: academic goals on reading and math skills and the requisite services to enable the Student to reach those goals including a classroom with a low teacher to student ratio, and behavioral support services?
- (3) Whether the Respondent denied the Student a FAPE when it failed to determine the behavior of the Student warranted a reevaluation including a functional behavioral assessment (FBA)?

The substantive requested relief at the time of hearing is:

- (1) An independently provided FBA.
- (2) Compensatory education consisting of 20 hours of independent counseling and 10 hours of tutoring in reading, math, and writing, and an additional 5 hours of reading fluency instruction.
- (3) Revisions to the IEP including: reading, math, and social/emotional goals.

The Respondent denied the Student a FAPE when it did not provide special education services in conformity with the Student's IEP following his enrollment at School. The Respondent did not deny the Student a FAPE as a result of the IEP lacking goals in reading and math, and special education services to reach such goals. The Respondent did deny

the Student a FAPE as a result of the IEP not being revised to include behavioral support services. The Respondent denied the Student a FAPE when it did not conduct an FBA to discover the function of his behaviors at school.

IV. EVIDENCE

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

- 1) Bryan Daniel, Educational Advocate (B.D.)
- 2) The Student's Mother, Petitioner (P)
- 3) The Student, (S)
- 4) Natasha Nelson, Clinical Psychologist (N.N.)³

The Respondent's witness was Special Education Teacher (A.O.).

21 exhibits were admitted into evidence of 34 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 4	June 1, 2010	IEP
P 5	June 2, 2011	IEP
P 7	June 1, 2010	Advocate Notes
P 8	June 2, 2011	IEP Meeting / Meeting Minutes
P 9	March 27, 2009	Psycho-Educational Evaluation
P 10	March 31, 2010	Functional Behavioral Assessment
P 11	March 31, 2010	Comprehensive Psychological Evaluation
P 14	April 20, 2009	Student Report [DC-CAS]
P 15	September 16, 2009	Administrative Discipline Action Form
P 16	October 2, 2009	Letter from Peale to Parent
P 17	December 7, 2009	Letter from Peale to Parent
P 18	June 1, 2010	Final Eligibility Determination Report
	April 28, 2010	Analysis of Existing Data
	June 1, 2010	Prior Written Notice – Identification
P 19	December 1, 2010	STS High School Placement Test Performance Profile

³ Expert in clinical psychology.

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 20	Undated	Quarter 1 Report Card [2010-2011]
	Undated	Quarter 2 Report Card [2010-2011]
	Undated	Quarter 3 Report Card [2010-2011]
	Undated	Quarter 4 Report Card [2010-2011]
P 21	October 5, 2011	Period to Daily Conversion Attendance Summary
	October 5, 2011	Attendance Summary
P 22	Undated	Student Statement – Form 2
P 23	Undated	Student Incident Report 08/22/2011-10/05/2011
P 24	September 21, 2011	Student Schedule Eastern SHS
P 25	October 5, 2011	Notice of Final Disciplinary Action
P 27	October 28, 2011	Report to Parents on Student Progress
P 31	October 28, 2011	Email Chain ending from Chor to CdeBaca, et al.

Four of 13 documents disclosed by the Respondent were entered into evidence. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 10	October 27, 2011	Student Letter of Invitation – IEP Meeting
	Undated	Student Information
R 11	October 28, 2011	Report to Parents of Student Progress
R 12	November 3, 2011	Attendance Summary
R 13	November 3, 2011	Email Chain ending from Hassan to CdeBaca

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

V. FINDINGS OF FACT

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

1. Student is a year old learner with a disability.⁴ He is diagnosed with attention deficit/hyperactivity disorder, combined type (ADHD), learning disorder, not otherwise specified (under DSM IV 315.9, not IDEA), and oppositional defiant disorder (ODD).⁵ The IEP team at PCS determined the Student was eligible for special education and related services under the definition of other health impaired (OHI).⁶
2. In April 2009 the Student was in the sixth grade and scored proficient in reading and basic in mathematics on the DC-CAS, the statewide assessment of academic achievement.⁷
3. A "Functional Behavior Assessment" was conducted and a report written on March 31, 2010.⁸ The report fails to identify the functions of the Student's behaviors, however, and is not useful for determining and planning for replacement behaviors.⁹
4. The most recent comprehensive psychological evaluation of the Student was completed in March 2010.¹⁰
5. The Student's general intellectual ability is in the average range, including his verbal ability, thinking ability, and cognitive efficiency.¹¹ His academic functioning is in the average to low average range.¹² Some of his social-emotional functioning is in the average range but for personal adjustment, externalizing problems, school and attention problems, and adaptive skills, all of which are in the at-risk range.¹³

⁴ P 4, P 5.

⁵ P 11, Testimony (T) of N.N.

⁶ P 4, P 5, P 18.

⁷ P 14.

⁸ P 10.

⁹ P 10.

¹⁰ P 11, T of N.N.

¹¹ P 11. T of N.N.

¹² P 11, T of N.N.

¹³ P 11

6. The Student processes information slowly, which is consistent with his diagnosis of ADHD.¹⁴ Other symptoms of ADHD have affected him in the following ways: failing to pay close attention to details or making careless mistakes in schoolwork; having trouble sustaining attention on academic tasks; not following through on instructions and failing to finish homework or chores; having difficulty organizing tasks and activities; avoiding tasks that require sustained mental effort such as schoolwork and homework; losing necessary things, like class notes; being easily distracted by extraneous stimuli; often leaving seat in classroom situations where remaining seated is necessary and expected; often being on the “go” or “driven by a motor;” often blurting out answers before questions have been completed; and interrupting others’ activities.¹⁵
7. The Student’s ODD symptoms include: often arguing with adults; actively defying or refusing to comply with adults’ commands; often easily annoyed by others; and being angry or resentful.¹⁶
8. The Student attended PCS prior to the 2011-2012 school year.¹⁷
9. PCS revised the Student’s IEP June 2, 2011.¹⁸ The IEP did not address any of the Student’s social-emotional problems.¹⁹ It only addressed writing skills, which may be impacted by the Student’s ADHD due to carelessness, failing to use proper punctuation, and leaving out words.²⁰
10. The IEP includes the following special education and related services, and supplementary aids and services, to aid the Student in reaching his four written expression goals (the only

¹⁴ P 11, T of N.N.

¹⁵ P 11.

¹⁶ P 11, T of N.N.

¹⁷ P 5, T of P.

¹⁸ P 5.

¹⁹ P 5.

²⁰ P 11.

annual goals in the IEP): specialized instruction in the general education setting for five hours per week; repetition of directions; preferential seating; small group testing; breaks between subtests and extended time on subtests.²¹

11. The Student failed reading and math for the 2010-2011 school year, earned “D” grades in social studies and Spanish, earned “C” grades in science, physical education, and music, and earned an “A” in art.²² Statewide academic assessments showed the Student was proficient in both reading and math.²³

12. The Petitioner enrolled the Student at _____ School the week before school began for the 2011-2012 school year.²⁴ In filling out enrollment forms, the Petitioner noted the Student had an IEP, and a staff person at Eastern advised her to bring the IEP to the school, which the Petitioner did the following day.²⁵ The IEP was not forwarded to the appropriate staff at the school and was not acknowledged by the special education staff or school principal until September 22 or 23, 2011.²⁶

13. One of the Student’s special education teachers began working with him on September 30, 2011.²⁷ Rather than follow the IEP, the Respondent is providing the Student with specialized instruction in mathematics in the general education setting for three hours per week and specialized instruction in English for two to three hours per week.²⁸ The Student receives a total of six hours of specialized instruction per week.²⁹

²¹ P 5.

²² P 20.

²³ P 20.

²⁴ T of P.

²⁵ T of P.

²⁶ T of P.

²⁷ T of A.O.

²⁸ T of A.O.

²⁹ T of A.O.

14. The Respondent did not obtain records from PCS, did not attempt to convene an IEP team meeting until November 2011, and no IEP team meeting has been held nor the IEP revised.³⁰
15. The Student missed some school due to illness, was tardy on multiple occasions, and has been suspended at least six days thus far during the 2011-2012 school year.³¹ Behaviors resulting in discipline include: getting mad and being disruptive and disrespectful.³² The Student requires constant redirection in the classroom.³³
16. As of October, 2011, the Student was failing Algebra and possibly Biology, due to not completing assignments and excessive absences.³⁴

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).

³⁰ T of P, T of A.O., R 12, Resolution Period Disposition Form (November 16, 2011).

³¹ T of P, T of S, R 11, R 12.

³² T of S, T of A.O., P 23, P 25.

³³ T of A.O.

³⁴ P 27.

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. The IDEA “is violated when a school district deviates *materially* from a student’s IEP.” Wilson v. D.C., 770 F.Supp. 2d 270, ___, 56 IDELR 125, ___ (p 7 of C.A. 09-02424) (D.D.C. 2011), *citing*: Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”); *accord* S.S. ex rel. Shank v. Howard Road Acad., 585 F. Supp. 2d 56, 68 (D.D.C. 2008); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff’d sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007). “[T]he materiality standard *does not require that the child suffer demonstrable educational harm* in order to prevail” on a failure-to-implement claim. Wilson, at p 7 (emphasis in original), *citing*: Van Duyn, 502 F.3d at 822 (emphasis added); *cf.* MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). “Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” Id., *See, e.g., Van Duyn*, 502 F.3d at 822; S.S., 585 F. Supp. 2d

at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

4. The Petitioner provided the Respondent with a copy of the Student’s IEP when she enrolled him at _____ School before the start of the school year. The IEP was not implemented until nearly October, at which point it was not followed (the Student only had goals for writing, but specialized instruction was provided in math as well as English for a total of six hours per week rather than five). The failure to provide any special education services, pursuant to an IEP, for over a month is a material failure to implement the IEP, given the necessity to track student progress and make adjustments to the instruction or IEP over time. (See 34 C.F.R. § 300.324(b)). “[A] ‘complete failure’ to implement a student’s IEP is ‘undoubtedly’ a denial of an appropriate education under the IDEA.” Wilson at p.5, fn.1, *citing* Abney ex rel. Kantor v. District of Columbia, 849 F.2d 1491, 1496 n.3 (D.C. Cir. 1988).
5. 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" provided by the IDEA for this Student, and as described by the Supreme Court, consists of the opportunity for advancement in the grade level content for the grade in which the Student is enrolled.

6. The Student is a mainstreamed student and is involved in the general curriculum, although his progress is being hampered by behaviors resulting from his disability. This Student's disabilities, ADHD and ODD, result in problems attending to class and class work as well as resulting in removals from the class room. The Student's poor grades are not the direct result from his disability (he has shown proficiency in reading and math on state-wide academic achievement tests), but rather are an indirect result. (N.N. diagnosed the Student with a non-specified learning disorder. This appears to be a catch-all due to academic performance being less than what could be expected of him based on his ability. She noted, however, that the Student's academic performance was consistent with what may be expected of a student with ADHD. Furthermore, the Student has not been determined to meet the definition of specific learning disability under IDEA. Thus, it is reasonable to conclude the Student's disabilities are not the direct cause of any academic failure.) Therefore, the Student does not require goals and services to address academic achievement, but rather goals and services to address his functional behavioral skills which will, in turn, affect his academic achievement. The

Student's IEP bears no resemblance to the Student as it does not address his functional performance and behavioral goals and services to reach such goals. See, 34 C.F.R. § 300.320(a): IEP must include a "statement of measurable annual goals, including. . . 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 special education and related services to "be provided to enable the child – (i) To advance appropriately toward attaining the annual goals; [and] (ii) To be involved in and make progress in the general education curriculum. . . ." Because the IEP lacks goals addressing the Student's functional performance, specifically behavior, which is where his needs stemming from his disability lie, it is not reasonably calculated to provide educational benefit and therefore denies the Student a FAPE.

7. A reevaluation of a child with a disability must be conducted if the school district determines that the educational or related services needs of the child warrant a reevaluation. 34 C.F.R. § 300.303(a)(1). The question in this case is whether the Student's needs reasonably warranted a reevaluation? This IHO concludes that they did.
8. The IEP was last revised by another LEA. This is no defense to the appropriateness of it once the Respondent became responsible for providing FAPE to the Student. An IEP is not a static document and an LEA is responsible to ensure that an IEP team reviews IEPs *periodically*, but not less than annually, to determine whether the annual goals are being achieved and to revise 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.

34 C.F.R. § 300.324(b), D.C. Mun. Regs. 5-E3008.1. The Respondent didn't implement the IEP as written at all until over a month into the school year, at which point the IEP was not implemented as written. Given the IEP came from another public agency, and given the Respondent was observing behavioral problems from the Student, it was obligated to convene the IEP team to discuss the Student's disability, his academic achievement, and functional performance. Such a meeting would have led to concern about the IEP and data upon which it was based, which the Respondent was lacking. This would have reasonably triggered either a request of records from the Student's prior school, or to propose a reevaluation of the Student. None of this happened, the Student experienced repeated behavior problems, and his grades are suffering in some classes, thus demonstrating a denial of FAPE. Even if record from PCS had been requested and obtained, the Respondent would have seen that the last FBA conducted of the Student included little useful data as it did not describe the function of the Student's behaviors.

9. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3rd 516, ___, 43 IDELR 32, (p 5, p 6) (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student

has established a denial of the education guaranteed by the IDEA, the Court or the hearing 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).

10. To remedy the Student's denial of FAPE he must be reevaluated with an FBA at his current school. Following the FBA, the IEP team must meet to review the assessment report and review and revise the IEP to include: a statement of the Student's functional performance including how his disability affects his involvement and progress in the general education curriculum; a statement of annual measurable functional goals designed to meet his needs that result from his disability to enable him to be involved in and progress in the general curriculum and his other educational needs; 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 Student to enable him to advance appropriately toward attaining his annual goals, to permit him to be involved in and progress in the general education curriculum as well as extracurricular and other nonacademic activities, and to enable him to be educated and participate with nondisabled children; that these services will start within one week of the proposal if the Petitioner does not object to them following prior written notice, including their anticipated frequency, location, and duration; and educational placement of the Student on the continuum of alternative placements. The Student will also be provided compensatory education in the form of 10 hours of counseling services to be provided between the date of this order and the start of the services in the revised IEP to address the Student's behavioral needs including anxiety, strategies to cope with executive

functioning deficits, and his oppositional defiant disorder. The Student will be provided compensatory education in the form of the opportunity to make up any failing grades he is currently receiving.

VII. DECISION

Issue 1: The Petitioner prevails because the Respondent denied the Student a FAPE when it did not provide special education services in conformity with the Student's IEP following his enrollment at Eastern Senior High School.

Issue 2: The Respondent prevails in part and the Petitioner prevails in part because the Respondent did not deny the Student a FAPE as a result of the IEP lacking goals in reading and math, and special education services to reach such goals. The Respondent did deny the Student a FAPE as a result of the IEP not being revised to address his social emotional needs stemming from his disabilities.

Issue 3: The Petitioner prevails because the Respondent denied the Student a FAPE when it did not convene a team meeting to obtain or review data and to propose a reevaluation to obtain data about the Student's functional behavior.

VIII. ORDER

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

1. The Respondent will conduct an FBA of the Student beginning no later than January 3, 2012. The FBA will examine all aspects of the Student's identified negative behavior, including attendance, to determine why the Student engages in such behavior (the function of the behavior), and propose possible replacement behaviors to meet those functional needs and

ways to obtain those replacement behaviors. The FBA must be completed no later than January 20, 2012.

2. No later than January 27, 2012, the IEP team must meet to review the FBA report and review and revise the Student's IEP accordingly. The IEP must be revised to include:

(A) A statement of the Student's present levels of functional performance including how his disability affects his involvement and progress in the general education curriculum;

(B) A statement of annual measurable functional goals designed to meet his needs that result from his disability to enable him to be involved in and progress in the general curriculum and his other educational needs;

(C) 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 Student to enable him to advance appropriately toward attaining his annual goals, to permit him to be involved in a progress in the general education curriculum as well as extracurricular and other nonacademic activities, and to enable him to be educated and participate with nondisabled children;

(D) The anticipated start date of these services, no sooner than one week of the proposal if the Petitioner does not object to them following prior written notice, including their anticipated frequency, location, and duration; and

(E) The educational placement of the Student on the continuum of alternative placements.

All other requirements pursuant to 34 C.F.R. § 300.320 must also be met. This order does not require academic goals, and does not prohibit them if data shows the Student's disability is directly affecting his academic achievement, as opposed to indirectly affecting it through functional problems stemming from his disabilities.

3. The Student will be provided 10 hours of counseling services to address his behavioral needs including anxiety, strategies to cope with executive functioning deficits, and his oppositional defiant disorder. These counseling services will be provided on site and between the date of this order and the start of the services in the revised IEP pursuant to this order.
4. The Student will be provided the opportunity to make up any failing grades that have occurred up to the date of this order. This opportunity will be available to the Student from the date of this order until the end of the 2011-2012 school year. Once the Student has earned a passing grade, the services to assist with making up that grade need no longer be provided. The services need not be provided beyond the end of the school year, unless the Respondent failed to make them reasonably available during the timeframe herein. These services do not guarantee the Student to achieve any particular grade above passing the particular class or demonstrating basic competence in the curriculum material that was not previously passes or demonstrated by the Student. If the Student has not failed or is not failing any classes for the 2011-2012 school year as of the date of this order, this opportunity to make up failing grades need not be provided.

IT IS SO ORDERED.

Date: December 15, 2011



Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).