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]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: August 2, 2011

Hearing Officer: Jim Mortenson

Case No:

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on May 19, 2011. The Petitioner is represented by Miguel Hull, Esq., and the Respondent is represented by Harsharen Bhuller, Esq.

A resolution meeting was held May 31, 2011, and the parties did not reach a settlement or any other agreements changing the 30 day resolution period. A response was untimely filed on June 3, 2011. A prehearing conference was held on June 3, 2011, and a prehearing order issued on that date.

The hearing was convened and held on July 26, 2011, in room 2004 at 810 First Street NE, Washington, D.C. The due date for the hearing officer determination (HOD) is August 2, 2011. This HOD is issued on August 2, 2011.

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[1] Personal identification information is provided in Appendix A 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, Chap. 30.

III. ISSUES and RELIEF SOUGHT

The issues to be determined by the IHO are:

(1) Whether the Respondent failed to offer or provide the Student with an individualized education program (IEP) reasonably calculated to provide the Student with educational benefit when it failed to provide sufficient special education and related services to enable the Student to be involved in and progress in the general education curriculum, and failed to include appropriate measurable postsecondary goals and transition services to reach those goals?

(2) Whether the Respondent failed to conduct an evaluation of the Student sufficiently comprehensive to identify all of the Student's special education and related service needs when it did not conduct an occupational therapy (OT) assessment?

The substantive requested relief at the time of hearing included:

(1) A revision of the IEP to include full-time special education services and appropriate measurable postsecondary goals and transition services.

(2) Placement at a segregated private special education day school.

(3) An independently provided OT assessment.

IV. EVIDENCE

Six witnesses testified at the hearing, all for the Petitioner.

The witnesses for the Petitioner were:

1) The Petitioner (P)

2) The Student (S)

3) Juan Fernandez, Educational Advocate (J.F.)

4) Natasha Nelson, Psychologist (N.N.)

5) . Education Director,

6) Leonard McPherson, Occupational Therapist (L.M.)

13 documents were disclosed by the Petitioner and 12 were admitted into evidence.[2] The Petitioner's exhibits are:

Ex. No.	Date	Document
P 2	May 13, 2011	IEP
P 3	March 9, 2010	IEP
P 4	February 6, 2009	Summary and Score Report
P 5	October 28, 2010	Report to Parents on Student Progress
P 6	November 30, 2010	Transcript, Letter of Understanding
P 7	January 14, 2011	Proposed Settlement [Signed January 18 and 19, 2011]
P 8	March 2, 2011	Email chain ending March 2, 2011
P 9	February 15, 2011	Comprehensive Psychological Evaluation
P 10	March 28, 2011	Email chain ending March 28, 2011
P 11	March 25, 2011	Level II Vocational Assessment
P 12	May 13, 2011	Email from Fernandez to Sado
P 13	February 17, 2011	Letter from Corley to [P]

Five documents were disclosed by the Respondent and all were admitted into evidence. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	May 13, 2011	Multidisciplinary Team (MDT) [IEP team] Meeting Notes
R 2	May 13, 2011	IEP (without transition plan)
R 3	[Undated]	Post-Secondary Transition Plan (from May 13, 2011 IEP)
R 4	June 1, 2011	Attendance Summary
R 5	January 14, 2011	Proposed Settlement [Signed January 18 and 19, 2011]

[2] P 1 was not admitted as it was the complaint, which is already part of the record.

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 seventeen year old learner with a disability.[3] The Student has specific learning disabilities in the areas of reading, writing, and mathematics.[4]
2. The Student was enrolled at School in the spring of 2011, in the 11th grade, and was transferred to School following an IEP team meeting on May 13, 2011.[5]
3. A comprehensive psychological evaluation of the Student was completed and an assessment report written on February 15, 2011.[6] The evaluation was completed by N.N.[7] The Student's full scale IQ was measured at 81, the below average range.[8] The Student demonstrated difficulties in the areas of fine motor and visual integration skills as measured by the WISC-IV Perceptual Reasoning Index and the Beery VMI.[9] N.N. recommended an OT assessment for a more in-depth review of these skills to determine whether the Student's fine motor and visual integration skills are impacting her involvement and progress in the general curriculum to the extent that services to address that impact are necessary.[10] N.N. also recommended the following:[11]
   1) Full time special education given her extensive learning difficulties and deficits in reading, math and writing.

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[3] Testimony (T) of S, P 2/R 2.
[4] T of N.N., P 2/R 2, P 9.
[5] T of S, T of P, T of J.F.
[6] P 9.
[7] T of N.N., P 9.
[8] P 9.
[9] T of N.N., P 9.
[10] T of N.N., P 9.
[11] P 9.

2) A small classroom setting with accommodated seating, use of extra time, and use of calculators, as determined necessary by her teachers.

3) Extra tutoring outside of the school setting.

4) Encouragement to read books, keep a vocabulary log, practice vocabulary and spelling, writing essays, and perfecting handwriting skills.

5) Use of visual and auditory learning techniques.

6) Step-by-step explanations on, e.g., the rudiments of language structure, phonemes, syntax, and segmentation.

7) Individual counseling to address behaviors, to teach her effective self-monitoring techniques, and to help her with appropriate problem solving skills in emotionally overwhelming situations.

8) Extracurricular and educational activities such as mentorship programs or book clubs.

9) A vocational evaluation.

10) A functional behavioral assessment and behavior intervention plan.

11) Consistent implementation of all services.

4. The Petitioner, through Counsel, requested an OT assessment on February 22, 2011.[12]

5. A transition assessment of the Student was conducted by L.M. on March 7, 2011.[13] The assessment report recommended:[14]

1) Typing instruction.

2) Career exploration activities.

3) Life skills training for independent living to include communication, work, and study skills.

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[12] P 8.
[13] T of L.M., P 11.
[14] P 11.

4) Employment skills training.

5) Hands-on experience with career interest.

6) Counseling to address emotional skills and impacts of those skills.

7) Mentoring.

8) Volunteering with a non-profit organization.

The Student has an interest in the criminal justice system (probation officer), photography, cosmetology, and working with children.[15]

6. The Student's attendance was a significant problem and including being tardy, missing class, and missing class due to being prohibited from attending due to being tardy.[16] The Student often did not make the effort to get to school on time, attend class, or seek additional help afterschool due to a lack of responsiveness from teachers and staff.[17] The Student's attendance greatly improved when she began attending High, her neighborhood school.[18]

7. The Student's most recent prior IEP was developed March 9, 2010.[19] That IEP included three academic goals in reading based on 9th grade standards.[20] That IEP also included a statement of her present level of functional performance indicating she has difficulty following directions of authority figures and has extremely poor attendance.[21] There was one functional goal to address the Student's functional performance which expected her to "improve her self expression and compliance with both support services and academics."[22] The services to meet these goals and to permit the Student to be involved in and progress in the general

[15] T of L.M., T of S, P 11.
[16] T of S, T of P, R 4.
[17] T of S.
[18] T of S, T of P.
[19] P 3.
[20] P 3.
[21] P 3.
[22] P 3.

curriculum included 3.5 hours per week of unspecified specialized instruction in the general education setting, 3.5 hours per week of unspecified specialized instruction outside the general education setting, and 30 minutes per week of behavioral support services outside of the general education setting.[23] The IEP states the Student received specialized instruction in both "ELA" and math, although it is not known what "ELA" stands for (or whether it is an acronym related to reading) and there were no math goals in the IEP.[24] Supplementary aids and services (listed in the IEP as "classroom accommodations") included: repetition of directions, simplification of oral directions, use of calculator, preferential seating, small group testing, location with minimal distractions, tests administered over several days, breaks between "subtests," extended time on "subtests," and breaks during a "subtest."[25]

8. The Student's IEP was revised on May 13, 2011.[26] The revisions to the annual goals were significant in that goals for writing and math were added.[27] The three math goals were based on sixth through eighth grade standards.[28] The three writing goals were based on fifth through ninth grade standards.[29] The three reading goals were based on ninth through eleventh grade standards.[30] There were now two functional goals, one to improve attendance and the other improve on task behavior.[31] The special education and related services and supplementary aids and services in the IEP were not changed.[32]

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[23] P 3. (The IEP listed 3.5 hours per week of specialized instruction in the general education setting twice. This appears to have been a typographical error as there is no distinction between the two statements.)
[24] P 3.
[25] P 3 (The last three "accommodations" appear to be for state or district-wide testing, although the IEP states the Student did not require accommodations for such tests.)
[26] P 2/R 2.
[27] P 2/R 2.
[28] P 2/R 2.
[29] P 2/R 2.
[30] P 2/R 2.
[31] P 2/R 2.
[32] P 2/R 2.

9. The IEP includes the post-secondary goals of attending a four year college offering a criminal justice or law enforcement program and becoming a probation officer or working with children in a recreation facility.[33] The IEP includes several "annual measurable goals for post-secondary transition."[34] These "goals" are really transition services that the Respondent is to provide to the Student (e.g. meeting with a high school counselor to plan academic year, develop job applications and create cover letters, etc.).[35] Other transition services listed include four hours per week of computer processing class, interview of a professional "in her dream occupation" (not specified whether this is probation officer or recreation worker), and a visit to DC-CAP to learn about college visits, scholarships, and secondary education opportunities.[36] The courses of study listed that the student need to take are not specific (e.g. "electives 3.5 credits").[37]
10. At the May 13, 2011, IEP team meeting the Petitioner, through her advocate, requested that the services for the student be increased to "full-time" based on the recommendation in the February 2011 comprehensive psychological evaluation assessment report.[38] The team did not agree on this and the Respondent did not change the services.[39] No prior written notice for the proposed or refused changes in the IEP was provided by the Respondent. The Respondent believed, based solely on her IQ score, that the Student could "do the work, so providing a full-time placement service would not be the least restrictive environment. A full-time placement would be appropriate for a student with lower cognitive abilities." [40]

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[33] P 2/R 3.
[34] P 2/R 3.
[35] P 2/R 3. (It is not known why these services are listed as "annual goals."
[36] P 2/R 3.
[37] P 2/R 3.
[38] T of J.F., R 1, P 9.
[39] T of J.F, R 1.
[40] R 1.

11. The Student's IEP was not implemented at for the last few weeks of the 2010-2011 school year.[41] The Student failed her classes for the 2010-2011 school year and will be retained in the 11th grade.[42] The Student is capable of learning to read, write, and do math with the correct educational supports, environment, and programming.[43]

12. The Student visited and was accepted at in February 2011.[44] is a private full-time therapeutic day school for students with disabilities and is located in Virginia.[45] Life skills training is provided as well as vocational training and work on employment skills.[46] Secondary academics are also worked on.[47] Classes are small with no more than ten students and are very structured, as it the school in general.[48] Behavior problems, including truancy, are addressed immediately and proactively and include getting the student to school and in class.[49]

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* DCMR 5-E3030.14. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to meet their burden.

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[41] T of S, T of P.
[42] T of S, T of P.
[43] T of N.N.
[44] T of , P 13.
[45] T of
[46] T of
[47] T of
[48] T of , T of S, T of P.
[49] T of

DCMR 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. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See:* 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006).

4. The Supreme Court has described the purpose of the IDEA as providing a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). When a child is mainstreamed:

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

Id. at 203. The Court held:

> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.

> Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

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

5. 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 peerreviewed 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.

6. "Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability[.]" 34 C.F.R. § 300.39(a)(1).

7. Federal Regulations at 34 C.F.R. § 300.39(b)(3) defines "specially designed instruction" as:

> adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
> (i) To address the unique needs of the child that result from the child's disability; and
> (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

8. "Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education,. . . ." 34 C.F.R. § 300.34(a).

9. 34 C.F.R. § 300.503 requires:

> [w]ritten notice that meets the requirements of paragraph (b) of this section. . . be given to the parents of a child with a disability a reasonable time before the public agency—
> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

10. Improvements were made to the IEP when it was revised in May 2011. The two skills areas for which annual goals had been written - reading and emotional, social, and behavioral development - were expanded to include goals in the academic areas of math and writing. All of the academic goals were based on education standards, although not necessarily the standards of the Student's grade level, and, based on the prior revision of the IEP, were designed to close the Student's performance gap to enable her to be involved in and progress in the general curriculum. The functional goals were designed to improve the Student's attendance and on-task behavior. The services in the IEP revised in May 2011 were not

changed from the prior IEP, however. The Respondent gave no explanation in the form of a prior written notice or testimony as to how the new and additional goals could be met with the same level of special education and related services as the prior year, particularly when the Student's academic and functional performance did not show improvement with the services provided under the prior revision of the IEP. The Respondent's assertion that the Student's lack of progress was based on her poor attendance is unavailing given that improved attendance was determined by the IEP team to be a functional behavior impacted by the Student's disability and was addressed in the IEP. Clearly, the services provided to achieve that goal were not successful and so the reasonable approach would be to change the services. This the Respondent did not do. The Respondent's rationale at the IEP team meeting for not changing the level of services as requested by the Petitioner appeared to be based on a single factor, the Student's IQ score. As a result, the services in the proposed IEP are not based on her specific and unique needs, but rather a blanket judgment about what is necessary for a child with an IQ of 81. *See* Federal Register, Vol. 71, No. 156, p. 46588 (August 14, 2006) ("In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, [or] severity of disability. . . .") Furthermore, once the IEP was revised in May 2011, the Respondent failed to implement it for the remainder of the school year and the Student failed all of her classes and did not advance to the next grade.

11. The IEP includes measurable postsecondary goals – to go to a four year college with a specific program of study, and one of two particular jobs or careers. The services must be appropriately listed as services provided to the Student, not as annual goals which are not required under 34 C.F.R. § 300.320(b). This will ensure the Respondent is accountable for

the provision of the services. Furthermore, the classes of study are not specific to advise the Student, her parent, or staff, what courses she needs to take in order to reach her postsecondary goals.

12. An evaluation of a child with a disability must be "sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. § 300.304(c)(6).

13. The Petitioner, through Counsel, requested an OT assessment on February 22, 2011. The comprehensive psychological assessment picked up indications that the Student may have special education and related services needs resulting from weaknesses in her fine motor and visual integration skills. To more adequately make determinations about these weaknesses and the impact on the Student's functional and academic performance and develop an appropriate education program, the Student required the recommended OT assessment. The Respondent never provided written notice of a proposal to conduct the OT assessment or its refusal to conduct the assessment and the assessment was not completed. The Petitioner provided no evidence justifying an independently provided OT assessment.

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). The Petitioners have shown, by a preponderance of the evidence, that the IEP must be revised and that is an appropriate placement to provide the special education and related services the Student requires. The Respondent's placement, School, did not implement the Student's IEP during the time she was there and no evidence was presented by the Respondent indicating this would change or whether that school could implement an IEP with significantly more services.

VII. DECISON

The Respondent denied the Student a FAPE when it did not offer or provide the Student with an IEP reasonably calculated to provide educational benefit when the IEP revised in May 2011 failed to include a change in the special education and related services designed to enable the Student to reach her annual goals and to be involved in and progress in the general education curriculum and failed to include transition services to enable her to reach her postsecondary goals.

The Respondent denied the Student a FAPE when it did not conduct a requested OT assessment and failed to provide the Petitioner written notice of its refusal.

VIII. ORDER

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

1. The Student's IEP will be revised to include specialized instruction for reading, mathematics and written expression. Due to a lack of specific evidence, the level of specialized instruction for each skill area shall be determined by the IEP team, but shall include a minimum of 25 hours of instruction per week outside of the general education setting. The IEP must also be revised to include an increase in specialized instruction or other related services, including individual counseling, to address the Student's functional goals. Again, due to lack of evidence in the record, the IEP team must determine the level of individual counseling services for the Student.
2. The Student's IEP will be revised to change those transition services that are listed as "annual measurable goals for post-secondary transition" to reflect that they are services to be provided to the Student by the Respondent or other responsible agency. Those "goals" that

are not services need not be kept in the IEP but can be if so determined by the IEP team. The courses of study must be specific to identify which classes the Student should take in order to reach her post-secondary goals.

3. The IEP revision must be completed prior to the start of the 2011-2012 school year. The Respondent shall confer with and invite staff and propose three alternative meeting times to the Petitioner and inform the Petitioner of which date and time the IEP team will meet if she fails to choose one of the meeting times, which may not be consecutive.
4. The Student will be placed at for the 2011-2012 school year with transportation and related services provided or paid for by the Respondent. If cannot or will not maintain the Student's enrollment or fails to implement the Student's IEP, the Respondent will change the Student's location of services to a substantively comparable public or private school.
5. The Respondent will provide or conduct an OT assessment of the Student and review the assessment report with the IEP team no later than September 9, 2011. The IEP team will revise the IEP as appropriate to address any necessary changes to the IEP resulting from the assessment data and the team's review of the IEP and the data. This HOD does not address any disputes over changes to the IEP proposed or refused as a result of the OT assessment data.

IT IS SO ORDERED.

Date: August 2, 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).