

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

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

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Date Issued: February 12, 2011

Hearing Officer: Jim Mortenson

Case No: :

OSSE  
STUDENT HEARING OFFICE  
2011 FEB 14 AM 9:55

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on December 13, 2010. A response to the complaint was filed on December 23, 2010. The Petitioner is represented by Alana Hecht, Esq., and the Respondent is represented by Cherie Cooley, Esq. A resolution meeting was held December 29, 2010, and did not result in a settlement. The parties did agree to proceed to hearing and the 45 day hearing timeline began December 30, 2011, pursuant to 34 C.F.R. § 300.510(c)(2). A prehearing conference was held with counsel on January 7, 2011, and a prehearing order was issued on January 10, 2011. The hearing was convened on February 4, 2011, in room 2004 at 810 First Street, NE, Washington, D.C. The due date for the hearing officer's determination (HOD) is February 12, 2011. This HOD is issued on February 12, 2011.

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<sup>1</sup> 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., 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 failed to provide the Student special education and related services in conformity with his individualized education program (IEP) since the start of the 2009-2010 school year because it offers only an inclusion setting at the Student's school?
- (2) Whether the Respondent failed to provide an IEP reasonably calculated to provide educational benefit when it did not include extended school year (ESY) services for the summer of 2010, did not include appropriate measurable post-secondary goals since February 2010, and did not include services in a full-time therapeutic setting since the start of the 2009-2010 school year?
- (3) Whether the Respondent failed to convene an appropriate IEP team meeting on February 1, 2010, when it did not invite the Petitioner to the meeting, and the meeting held that day did not include a regular education teacher or a qualified District representative?
- (4) Whether the Respondent failed to evaluate the Student in all areas of suspected disability when it failed to conduct a functional behavioral assessment (FBA) to determine why the Student was not attending class during the 2009-2010 school year, and it failed to conduct a comprehensive psychological assessment determined necessary by the IEP team?

The substantive requested relief is:

- 1) Compensatory education designed to improve the Student's academic performance; and
- 2) Placement at a full-time therapeutic program for children with needs similar to the Student's needs.

Based on the findings of fact and conclusions herein, this Independent Hearing Officer (IHO) has determined:

- 1) The Respondent failed to provide the Student special education and related services in conformity with his IEP from February 1, 2010 to the end of the 2009-2010 school year;
- 2) The Respondent failed to provide an IEP reasonably calculated to provide educational benefit when it did not include ESY services for the summer of 2010 and did not provide the Student instruction in a highly structured, therapeutic setting with a small student to teacher ratio;
- 3) The Respondent failed to convene an appropriate IEP team meeting on February 1, 2010, when it did not invite the Petitioner to the meeting and did not include a regular education teacher or a qualified District representative; and
- 4) The Respondent did not fail to evaluate the Student in all areas of suspected disability.

#### **IV. EVIDENCE**

Five witnesses testified at the hearing, all for the Petitioner. The witnesses are as follows:

- 1) Petitioner (P)
- 2) Educational Advocate,
- 3) Newland Educational Services CEO, Dr. Sharon Lennon (S.L.)
- 4) Parker Diagnostics Psychologist, Dr. Natasha Nelson (N.N.)

5) Educational Consultant,

28 documents were disclosed by the Petitioner and all were admitted into evidence. The

Petitioner's exhibits are:

Ex. No.	Date	Document
P 1	January 26, 2011	Compensatory Education Proposal
P 2	August 30, 2010	Letter from Talpsep to Hecht
P 3	January 11, 2011	Educational Evaluation
P 4	January 20, 2011	Vocational Evaluation
P 5	December 20, 2010	[Email chain ending from Marentic to Friedman-Mead]
P 6	December 10, 2010	Functional Behavior Assessment
P 7	[Undated]	Advocate Notes
P 8	December 7, 2010	IEP Meeting for the Jackson Siblings [Notes]
P 9	November 16, 2010	[Email chain ending from Miller to Hecht]
P 10	November 1, 2010	[Email chain ending from Miller to Miller, et al.]
	October 6, 2010	Letter from Miller to Special Education Team
P 11	October 6, 2010	IEP
P 12	October 6, 2010	Meeting Notes
P 13	August 30, 2010	District of Columbia Public Schools' Response to Petitioner's Due Process Complaint [Case
P 14	February 1, 2010	IEP
P 15	August 24, 2009	Notes Detail
	August 27, 2009	Notes Detail
	August 28, 2009	Notes Detail
	September 1, 2009	Notes Detail
	September 2, 2009	Notes Detail
	September 5, 2009	Notes Detail
	September 8, 2009	Notes Detail
	September 14, 2009	Notes Detail
	September 17, 2009	Notes Detail
	November 2, 2009	Notes Detail
P 16	October 28, 2010	Report to Parents on Student Progress
	March 26, 2010	Report to Parents on Student Progress
	January 22, 2010	Report to Parents on Student Progress
P 17	June 1, 2010	Transcript
	June 1, 2010	Letter of Understanding
	February 25, 2010	Student Timetable
P 18	[Undated]	Truancy Referral Checklist [and attached documents]
P 19	October 6, 2009	Attendance Intervention Assistance Form & Truancy Conference Report
	September 16, 2009	[Unexcused absence notice]
	October 14, 2009	[Unexcused absence notice]
	October 6, 2009	Attendance Summary
P 20	January 28, 2010	Psychological Evaluation

P 21	September 26, 2008	Educational Evaluation Summary
P 22	[Undated]	[Curricula Vitae for Natasha Nelson]
P 23	[Undated]	[Curricula Vitae for Sharon Lennon]
P 24	[Undated]	[Curricula Vitae for Belton Wilder]
P 25	[Undated]	[Curricula Vitae for Regina Miller]
P 26	[Undated]	[Curricula Vitae for Newton Lennon]
P 27	[Undated]	[Curricula Vitae for Patrice Brown]
P 28	January 27, 2011	Functional Behavior Assessment

Five documents were disclosed by the Respondent and all were admitted into evidence. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	October 8, 2009	Consent for Initial Evaluation/Reevaluation
R 2	October 6, 2010	Consent for Initial Evaluation/Reevaluation
R 3	September 2010	IEE Authorization Form
R 4	January 28, 2011	Attendance Summary
R 5	[Undated]	Archived Attendance History

#### 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. The Student is a            year old learner with a disability currently repeating the            grade at            The Student receives special education and related services as a result of eligibility under the definition of intellectual disability.<sup>3</sup>
  
2. The Student's current academic functioning in reading is at the kindergarten to second grade level.<sup>4</sup> His level in math is at the second to fourth grade level.<sup>5</sup> His level in writing is at the first grade level.<sup>6</sup> The Student's IEPs revised in February 2010 and October 2010 do not state the Student's present levels of academic achievement, as they refer to assessment data from

<sup>2</sup> P 6, P 11, P 16. (There was conflicting evidence, primarily from the Petitioner, that the Student is in the 10<sup>th</sup> grade. Based on records from the school district, the Petitioner's testimony appears inaccurate.)

<sup>3</sup> P 11, P 14.

<sup>4</sup> P 3.

<sup>5</sup> P 3.

<sup>6</sup> P 3.

2008, and the data they refer to for math and reading is not accurately recorded in the IEP.<sup>7</sup>

The Student has been failing nearly all of his academic classes, including those that are segregated special education classes.<sup>8</sup> At the end of the 2009-2010 school year, ninth grade, the Student had only earned one of 23.5 credits toward graduation.<sup>9</sup>

3. Leaving or failing to attend class has been a significant behavioral problem for the Student, and the Respondent has known about this since at least since eighth grade when he was evaluated by the Respondent in September 2008, and as noted in teacher reports, assessment reports, and other educational records.<sup>10</sup> Recommendations for dealing with the Student's attendance problems were made as early as September 2008, and subsequently.<sup>11</sup> The Student gets frustrated by his inability to perform academic tasks and often leaves the classroom.<sup>12</sup>
4. The Student's February 1, 2010, revision of his IEP, the first IEP in the record chronologically and in effect until the October 6, 2010, revision, requires specialized instruction outside of the general education setting for 26 hours per week, and behavioral support services outside of the general education setting for one hour per week.<sup>13</sup> There are approximately 30 hours in a typical school week.<sup>14</sup> During the 2009-2010 school year, from February 1, 2010, to the end of the year, the Student's school day consisted of one segregated special education class and three general education classes.<sup>15</sup>

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<sup>7</sup> P 11, P 14, P 21. (The assessment report states the Student was performing in the fourth to fifth grade range in math, but the IEP says the report said the fifth to seventh grade range.)

<sup>8</sup> P 16, P 17.

<sup>9</sup> P 17.

<sup>10</sup> T of P, R 4, R 5, P 6, P 11, P 15, P 18, P 19, P 20, P 21, P 28.

<sup>11</sup> P 20, P 21.

<sup>12</sup> T of P, P 3, P 6, P 11, P 15, P 20, P 21, P 28.

<sup>13</sup> P 14.

<sup>14</sup> T of L.C.

<sup>15</sup> P 16, P 17, T of L.C.

5. School staff recommended the Student attend summer school for 2010, but did not propose extended school year services.<sup>16</sup> The Student chose not to attend summer school and no one required him to.<sup>17</sup>
6. The February 1, 2010, revision of the IEP includes three post secondary goals, one of which is vague and not measurable.<sup>18</sup> The goal that is not measurable states: "Upon graduation, the student will be able apply [sic] the knowledge he has on managing his time and money well."<sup>19</sup> It is not known what knowledge the Student has or is expected to have on managing time and money, nor what constitutes applying this unspecified knowledge. The October 6, 2010, revision to the IEP removed the unmeasurable goal.<sup>20</sup>
7. When the IEP was revised on February 1, 2010, the Student could not participate in a full inclusion setting due to his inability to modulate his behavior when faced with academic challenges and/or social situations.<sup>21</sup> The READ 180 program was recommended to assist with the Student's reading. The Student required behavioral support to ensure he would remain in class, and once in class the Student would need instruction in a highly structured therapeutic setting with a small student to teacher ratio.<sup>22</sup> Small group instruction was required to improve skills acquisition, reduce distractions, and lessen feelings of intimidation and insecurity the Student would feel in a large group setting.<sup>23</sup>

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<sup>16</sup> T of P, P 14.

<sup>17</sup> T of P.

<sup>18</sup> P 14.

<sup>19</sup> P 14.

<sup>20</sup> P 11.

<sup>21</sup> P 20.

<sup>22</sup> P 20. (No evidence was presented contradicting the assessment report's recommendations, nor explaining why the recommendations were not included in the IEP.)

<sup>23</sup> P 20.

8. The Petitioner, the Student's Parent, was not invited to the February 1, 2010, IEP team meeting and did not attend.<sup>24</sup> The Respondent has admitted there was not a proper IEP team convened at the February 1, 2010, IEP team meeting, which lacked the Petitioner, a regular education teacher, and a qualified District representative.<sup>25</sup>
9. The IEP team, at the October 6, 2010, IEP team meeting, agreed a Woodcock Johnson III and a psycho-educational assessment would be completed, although it is not clear why.<sup>26</sup>

## 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. 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. The Supreme Court has described the purpose of the IDEA quite clearly:

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.

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<sup>24</sup> T of P, P 14.

<sup>25</sup> Admitted fact during Respondent's opening statement, P 14.

<sup>26</sup> P 12.

Board of Educ. v. Rowley, 458 U.S. 176, 203-204 (1982). It is within this legal context the case at hand must be examined.

2. The Respondent failed to provide the Student special education and related services in conformity with his IEP from February 1, 2010 to the end of the 2009-2010 school year. There was no evidence provided showing what the IEP provided prior to the February 1, 2010, revision, and so it cannot be determined whether or not the IEP was complied with prior to that date. The IEP revised on that date required 27 hours of special education and related services to be provided outside the general education setting. There are about 30 hours of school in a typical week. The Student was only in one class outside of the general education setting when all or nearly all of his classes should have been outside of the general education setting according to the IEP.
3. ESY services are to be provided, as determined by the IEP team, when necessary to provide a FAPE to a child with a disability. 34 C.F.R. § 300.106, DCMR 5-E3017 (2003).
4. The evidence is clear that despite often being promoted from grade to grade (he was not promoted to      grade) the Student was not progressing in the general curriculum, and his functional behaviors, particularly attendance, were not improving. Given the significant performance gap the Student clearly required additional services during breaks in programming, such as the summer, in order to progress. Staff recognized this and suggested summer school, but inexplicably failed to discuss as an IEP team, and propose ESY services, denying the Student a FAPE.
5. The IEP in effect when a student turns 16 years of age, or younger if determined necessary by the IEP team, must include appropriate measurable postsecondary goals based upon age

appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. 34 C.F.R. § 300.320(b), DCMR 5-E3009.3.

6. One of the three post-secondary goals in the Student's IEP revision of February 1, 2010, is vague and not measurable. A Student's post-secondary goals are critical to the determination of the annual academic and functional goals in the IEP because the purpose of the IEP is to prepare children with disabilities for further education, employment, and independent living. 34 C.F.R. § 300.1(a). The unmeasurable goal was removed when the IEP was revised in October 2010, thus resolving the problem, but it is unclear whether the Student needs a post-secondary goal concerning independent living skills given his level of cognitive functioning.
7. An IEP must specify the location of special education and related services and a determination of the child's educational placement must be made. 34 C.F.R. §§ 300.16 and 300.320(a)(7).
8. The Respondent's own evaluation of the Student recommended instruction in a highly structured, therapeutic setting with a small student to teacher ratio when the IEP was revised on February 1, 2010. There was no evidence of a legitimate explanation that such a recommendation should be ignored or altered and the resulting program denied the Student a FAPE.
9. 34 C.F.R. § 300.121, IEP Team, provides in relevant part:
  - (a) General. The public agency must ensure that the IEP Team for each child with a disability includes —
    - (1) The parents of the child;
    - (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
    - (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
    - (4) A representative of the public agency who —
      - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
      - (ii) Is knowledgeable about the general education curriculum; and
      - (iii) Is knowledgeable about the availability of resources of the public agency.
    - (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section. . . .

10. The School District is responsible for inviting the Parent to the IEP team meeting and making efforts to include her in the meeting. 34 C.F.R. § 300.322. The Parent must also be a member of any team making a placement decision. 34 C.F.R. § 300.327.
11. The Respondent failed to invite the Parent or otherwise include her in the February 1, 2010, IEP team meeting. The Respondent also failed to ensure a regular education teacher and a qualified representative of the public agency was at the meeting.
12. An evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6).
13. An evaluation is necessary to provide data to ensure proper educational programming for a child with a disability. The evidence shows there was substantial data to program appropriately for the Student when the IEP was revised in February 2010, and again in October 2010. The data in assessment reports going back as far as 2008 show the Respondent knew the Student's truancy was a manifestation of his disability and there were specific recommendations to deal with the behavior that were not followed. Furthermore, the evidence does not suggest another comprehensive psychological assessment was necessary, particularly since the last one was earlier in the year. It appears the IEP team did agree to some academic testing, but even this appears to be redundant because there was no lack of data in October as to the Student's academic and functional performance. Unfortunately, the school staff on the team failed to recognize that the Student's failure to attend class was a function of his disability, a coping mechanism, and rather than reflect on how they could effectively address that to ensure progress on goals and academic performance was made, determined the Student's absences made measurement of his academic performance difficult

without appropriately considering the overall programming for the Student. Based on the ever increasing academic performance gap and virtually no progress on improving or effectively dealing with the Student's attendance the Student has been denied a FAPE.

14. 34 C.F.R. § 300.513, Hearing decisions, provides, in relevant part:

(a) Decision of hearing officer on the provision of FAPE.

(1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies —

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

15. The purpose of the IEP is to help ensure a child with a disability has access to and can

participate in the general education curriculum, the same curriculum as his or her peers. 34

C.F.R. § 300.320. Helping a student meet State education standards, whether regular,

modified, or alternate standards, is a primary function of the IEP. *See*, 34 C.F.R. §§ 200.1,

300.17, and 300.160.<sup>27</sup> The IEP is a living document, and once a child's IEP is created, the

student's performance is continually monitored and the IEP reviewed and revised to address

lack of progress, successful achievements, or other changes. *See*, 34 C.F.R. § 300.324. Thus,

even though the local education agency (LEA) cannot guarantee a child will reach IEP goals

(DCMR 5-E3009.2), or a certain level of academic performance in general (Board of Educ. v.

Rowley, at 204-205 (1982)), it does have an obligation to continuously address the

educational programming for the student to ensure he or she can meet basic State standards

and the IEP goals (or modify the goals, if necessary). The various violations of the law in

this case have all contributed to the denial of a FAPE to the Student. Because the Student's

functional performance has not been effectively addressed, particularly his attendance

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<sup>27</sup> The District of Columbia has not employed the use of modified academic achievement standards.

(avoidance of classroom environment), his academic achievement also suffered. The appropriate remedy in this case must address both the lack of improvement in functional performance and the academic achievement gap. Placement at a full-time year round school for students with disabilities with a therapeutic environment is expected to address the Student's functional performance and academic achievement. The remediation necessary for the Student is reasonably expected to be improved by tutoring services outside of the normal school day.

### **VII. ORDER**

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

1. The Petitioner has obtained admission of the Student at \_\_\_\_\_ and non-public full-time year round school for students with disabilities, including those with intellectual disability, with a therapeutic environment for those students needed continual functional support. This school presents a likelihood of success for the Student and he is placed there at public expense and under public supervision, with transportation, effective February 17, 2011.
2. This placement shall remain in place at least until the end of the 2011-2012 school year, unless the non-public school expels the Student or the IEP team agrees that a different location or placement is necessary to ensure a FAPE. Any change in placement must be proposed, pursuant to 34 C.F.R. § 300.503, with an adequate prior written notice explaining the reasons for the proposed change and the data upon which the proposal is based.

3. The Student is awarded academic tutoring in reading, writing, and mathematics for four hours per week for one year, starting February 28, 2011.<sup>28</sup> A tutor is to be selected by the Petitioner who meets licensing and cost guidelines if provided by the Respondent. Reasonable breaks in tutoring, as determined by the tutor and Petitioner, will not extend the time for this award to be utilized. This award is to supplement and support the Student's daily academic instruction and aid in closing the Student's performance gap.
4. Nothing in this Order prohibits the IEP team from determining the Student will be assessed based on alternate achievement standards.

**IT IS SO ORDERED.**

Date: February 12, 2011



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Independent Hearing Officer

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<sup>28</sup> The Petitioner proposed a compensatory education plan (P 1) but it does not include an analysis of where the Student would have been academically and functionally but for the alleged violations. Thus, it is not entirely useful in making an award determination.

**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).