

**DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT
STATE ENFORCEMENT AND INVESTIGATION DIVISION**

-----X
a minor, by
and through her Parent(s),

**HEARING OFFICER
DETERMINATION**

Petitioners,

SHO Case No.

- against -

Deusdedi Merced, Hearing Officer

District of Columbia Public Schools,

Respondent.

-----X

Student I.D. Num.:
Attending Program:
Home School:

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioners Notice of Due Process Complaint (hereinafter, "Complaint"), filed on or about January 22, 2009. HO 1.¹ I was appointed shortly thereafter and a pre-hearing conference in the matter was scheduled for, and held on, February 4, 2009. HO 2, 3, and 5. A Response to the Complaint was filed on February 3, 2009. HO 4. The Pre-Hearing Conference Summary and Order was issued on February 4, 2009. HO 5.

A hearing was held on March 2, 2009, and continued on March 11, 2009.² It was a closed hearing, and the Petitioners were represented by Carolyn W. Houck, Esq.

¹ The Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioners Exhibits will be referred to as "P" followed by the exhibit number; and, Respondent Exhibits will be referred to as "R" followed by the exhibit number.

² Petitioners presented the testimony of the parent; the student; _____, Director, _____, Special Education Teacher, _____, and Nicole Zeitlin, Psy. D., Psychological Assessment Solutions, LLC. Respondent did not present any witnesses. Witness testimony will be referred to as "Testimony of" followed by the name of the witness.

Respondent was represented by Candace Sandifer, Esq. Petitioners entered into evidence exhibits 1 to 6, 8 to 11, 15, and 17 to 22³; Respondent did not enter into evidence any exhibits. Two additional Hearing Officer Exhibits were entered into evidence on consent of the parties. HO 6 is the Due Process Hearing Stipulated Facts. HO 7 is the student's Individualized Education Program (hereinafter, "IEP") dated June 6, 2006.

JURISDICTION

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter, "IDEIA"),⁴ 20 U.S.C. § 1400 *et seq.*, its implementing regulations, 34 C.F.R. § 300 *et seq.*, and the District of Columbia Municipal Regulations, Title 5, Chapter 30, Education of Handicapped (2003).

BACKGROUND

The student is _____ years old and attending the _____ at _____ In _____ grade, during the 2005 – 2006 school year, the student was enrolled in Respondent's _____ Middle School. The student was in special education during the _____ grade; however the last known Individualized Education Program (hereinafter, "IEP") for the student is dated June 6, 2006. Respondent has not been able to locate the student's educational records. The June 6, 2006 IEP classifies the student as learning disabled and recommended 10 hours per week of specialized instruction.

³ Proposed Petitioners Exhibits 12, 13, 14, and 16 were voluntarily withdrawn by Petitioners' counsel at the commencement of the hearing. Exhibit 7 was proposed but not entered into evidence.

⁴ In 2004, Congress reauthorized the Individuals with Disabilities Education Act (hereinafter, "IDEA") as the IDEIA. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005.

The student attended _____ Public Charter School in the 2006 – 2007 school year, but the June 6, 2006 IEP was not implemented, and the student was not provided with special education services during the school year. In the 2007 – 2008 school year, the student attempted to enroll in _____ Senior High School but was not able to do so because she was not able to produce a copy of her IEP. An IEP meeting was not held for the student for the 2007 – 2008 school year. The student did not attend school during the 2007 – 2008 school year. In October 2008, the student enrolled in

_____ Public Charter School, but dropped out in November 2008 because she struggled in school and was not provided with special education services. An IEP meeting was not held for the student for the 2008 – 2009 school year at the commencement of the 2008 – 2009 school year.

The student enrolled in the _____ at _____ on December 10, 2008. This appeal ensued seeking funding for this program.

ISSUES

The issues being presented to the undersigned for determination are as follows:

- a. Whether Respondent violated the child find provision, 34 C.F.R. § 300.111, of the IDEIA when it failed to evaluate the student and develop an IEP for the student since the 2006 – 2007 school year.
- b. Whether the June 6, 2006 IEP is reasonably calculated to enable the student to receive educational benefits. See Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982).

c. Whether Respondent denied the student a free and appropriate public education (hereinafter, "FAPE") when it failed to develop an IEP for the student for, and provide an appropriate placement during, the 2007 – 2008 school year.

d. Whether Respondent denied the student a FAPE when it failed to develop an IEP for the student for, and provide an appropriate placement during, the 2008 – 2009 school year.

e. Whether the _____ at _____ is an appropriate program consistent with the standard established in Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) and Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 (1985).

f. Whether the student is entitled to compensatory education services for the 2006 – 2007 and 2007 – 2008 school years for Respondent's failure to provide FAPE to the student.

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 resident of the District of Columbia whose home school is Respondent's _____ Senior High School (hereinafter, "_____ SHS"). Stipulation of the Parties, HO 6.

2. The student is _____ years old. See HO 1.

3. The student has been previously identified as a student with a Learning Disability and entitled to a FAPE pursuant to the IDEIA. HO 7; Stipulation of the Parties, HO 6.

4. The student attended Respondent's Middle School in the 2005 – 2006 school year when in the grade, and was a special education student.

Stipulation of the Parties, HO 6; P 3.

5. The student passed all of her classes at the completion of the grade in Respondent's Middle School. P 3.

6. Respondent has certified that it has not been able to locate the student's educational records. P 10.

7. The student's last known IEP is dated June 6, 2006 and would have been in effect for the 2006 – 2007 school year.⁵ See HO 7; Stipulation of the Parties, HO 6.

8. The student's June 6, 2006 IEP mandated 10 hours of specialized instruction in the resource room classroom.⁶ HO 7-1, 7-4.

9. The student attended Public Charter School (hereinafter, "PCS") in the 2006 – 2007 school year for the grade. PCS is not its own local educational agency (hereinafter, "LEA") for special education purposes. Stipulation of the Parties, HO 6; P 4.

10. The parent shared with PCS personnel that the student required special education services and provided the student with a copy of the student's IEP and evaluations. Testimony of Parent.

11. The student was not provided with special education services while at PCS. Id.

12. The student failed three out of five classes at the completion of the grade in PCS. P 4.

⁵ The June 6, 2006 IEP is missing page 3 and appears to be a draft that was not completed. See HO 7.

⁶ The June 6, 2006 IEP indicates that the student would receive 10 hours of specialized instruction, but calculates the total hours as 2.50 hours. See HO 7-1.

13. An IEP Team meeting was not held for the student for the 2007 – 2008 school year. Stipulation of the Parties, HO 6.

14. The student did not return to PCS for the 2007 – 2008 school year. Testimony of Parent.

15. The student attempted to enroll in SHS for the 2007 – 2008 school year while pregnant with her son. Testimony of Parent, Student; P 8-2.

16. The parent made three attempts in September 2007 to enroll the student in SHS. Testimony of Parent.

17. In her first attempt, the parent was not able to gain entry to the school because the school was on “lockdown.” Id.

18. In her second attempt, the parent spoke with three individuals, including the school’s principal. The parent informed the individuals that the student had been in special education and the parent was asked to provide the school with a copy of the IEP. Id.

19. The student informed the principal that she was two months pregnant and the principal expressed concern about the student walking the halls and climbing the stairs while pregnant. Id.

20. The student felt that the principal did not want her enrolled in the school because she was pregnant. Testimony of Student.

21. The parent was provided with “paperwork” to complete, inclusive of proof of residency and a school lunch form, and was asked to return the completed forms. Testimony of Parent.

22. Shortly after having received the paperwork, still in September 2007, the parent returned a third time to SHS with the completed paperwork but was told that the student would not be enrolled unless the student's IEP was provided to the school. Id.

23. The parent made attempts to secure a copy of the IEP, but was not successful. Id.

24. The student did not attend school during the 2007 – 2008 school year. Testimony of Parent, Student; P 11-2.

25. In April 2008, the student gave birth to her son. Testimony of Parent.

26. An IEP Team meeting was not held for the student at the commencement of the 2008 – 2009 school year. Stipulation of the Parties, HO 6.

27. The student enrolled in Public Charter School (hereinafter, “PCS”) in late October 2008 but left the school sometime in November 2008. PCS is its own LEA for special education purposes. Stipulation of the Parties, HO 6.

28. The student was not provided with special education services while attending PCS. The student struggled while attending PCS and dropped out in November 2008. Testimony of Parent.

29. Upon leaving PCS, the parent called a social worker who was working with the student and requested assistance. The social worker told the parent about and introduced the parent to Carolyn Houck, Esq., Petitioners' counsel.

30. On November 20, 2008, Petitioners, through their counsel, informed Respondent that Respondent had not provided any placement for the student during the 2007 – 2008 school year; that PCS was not an appropriate placement for the student for the 2008 – 2009 school year; and, that the student would be enrolled in an unidentified private program at Respondent's expense. P 5.

31. The parent made a second attempt to enroll the student in SHS in January 2009. Again, the parent shared with school personnel that the student had been in special education. However, despite two visits to the school, the student was not enrolled in the school because the parent had to first meet with a special education teacher who had not been present during her two visits. Testimony of Parent.

32. The student started in the at (hereinafter, “ ”) on December 10, 2008. Stipulation of the Parties, HO 6.

33. The student attends the program Monday through Friday from 8:30 a.m. to 2:30 p.m., with the exception of Wednesdays when the day ends at 1:00 p.m. Testimony of

34. There are seven students attending the program, five of which have been placed in the program through hearing officer determinations and one through a settlement agreement reached between Respondent and the parent(s) of the student. Testimony of

35. The program is not approved by the State Education Agency (hereinafter, “SEA”) of the District of Columbia. Id.

36. It is not a degree seeking program, but students are provided with “information on basic skills necessary for careers and alternative education routes to obtain” a GED or online high school classes toward a diploma. P 19-2; Testimony of

37. Upon entry into the program, the student was administered the Comprehensive Adult Student Assessment Systems (hereinafter, “CASAS”) to determine the student’s skill areas in academics, daily living, personal-social, and occupational knowledge. Testimony of ; P 19-2.

38. CASAS assesses the student’s basic reading, math, and writing skills within a functional context. Testimony of

39. Information gleaned from the initial administration of the CASAS formed the basis for a transition plan for the student. Id.; See P 19-2.

40. The transition plan is individualized for the student and utilizes the PLATO Adult Education web-based curriculum, which covers a wide range of skills, including mathematics, writing, reading and Language Arts, and life and career skills. Testimony of ; P 19-2, P 22-2.

41. The PLATO Adult Education curriculum is aligned to national assessments and standards, such as the CASAS. Testimony of P 22.

42. The District of Columbia SEA has endorsed the PLATO Adult Education curriculum for use by its educational programs and schools. Testimony of ; See P 21.

43. In January 2009, the student was administered the CASAS. She obtained a raw score of 212 in reading, which is a fourth grade functional level, and a raw score of 194 in math, which is a third grade functional level. Testimony of

44. The student's long-term goal is to participate in a General Educational Development (hereinafter, "GED") program, for which she has to be able to demonstrate a raw score of 236 in the CASAS, which would place her at a ninth grade functional level. Id.

45. To obtain this goal, the student is taught on a daily basis by a special education teacher, who holds a special education conditional license from the Commonwealth of Virginia to teach children with specific learning disabilities from kindergarten through 12th grade, has completed his Master's, and has applied for a provisional special education license in the District of Columbia. Testimony of

; P 17-1 – 17-2.

46. The student is provided with direct instruction in reading, math, life skills, and writing throughout the day using the competency plans from the PLATO Adult Education curriculum, which are also supplemented with teacher-prepared materials. The student is also taught job skills like checking emails, keyboarding, and public speaking. Testimony of

47. The student is provided with one hour per week of counseling services. Id.

48. The student has daily homework assignments, and can stay, and has stayed, after hours to work with the classroom teacher on her homework assignments. Id.

49. The student has made progress since starting the program, demonstrating an increase in reading fluency and progress in math and reading. Testimony of Parent, Student. The student now knows her multiplication table and can read and write on a computer, skills she did not have before entering the program. Testimony of Parent, Student.

50. The student is provided with a stipend from _____ for completing assignments, homework, and having good attendance.⁷ Payment is provided as incentive for the students to do well and to teach money management skills. Testimony of _____, Student; P 11-2.

51. The student is expected to attend classes on a daily basis and provide written notice prior to being absent, unless there is an emergency. Failure to follow protocol can result in her stipend being docked. Testimony of _____, Student.

52. On December 17, 2008, December 19, 2008, and January 6, 2009, the student underwent a comprehensive psycho-educational evaluation conducted by Nicole Zeitlin, Psy.D.⁸ P 11.

53. The student's intellectual functioning is in the Lower Extreme to Borderline range (i.e., 0.4 to 8th percentile) as determined by the Wechsler Adult Intelligence Scale, Fourth Edition (hereinafter, "WAIS-IV"). P 11-4.

54. The student is not mentally retarded. P 15-3. She is severely learning disabled. Testimony of Zeitlin.

⁷ The student is provided with \$20 per week for transportation costs, and an additional \$50 - \$60 per week for various accomplishments, such as completing assignments, homework, and good attendance.

⁸ Dr. Zeitlin has Bachelor of Arts Degree from West Virginia University in Psychology, a Master of Science Degree from Loyola College in Clinical Psychology, and a Doctor of Psychology Degree from Loyola College in Clinical Psychology. P 18.

55. The student's single word reading and phonemic decoding skills are in the Lower Extreme range. Her ability to read single words is better than 1% of same-aged peers. Her ability to decode words based upon phonemic decoding is better than 0.3% of same-aged peers. P 11-8.

56. The student's ability to comprehend simple sentences is at the Borderline range, yielding a performance better than 12% of same-aged peers. However, the student's ability to read increasingly complex and lengthy written passages, and to both answer questions from what she has read directly and to infer meaning based on contextual clues, is in the Lower Extreme range (i.e., better than <0.1% of same-aged peers). P 11-9.

57. The student's ability to calculate math, including word problems, is in the Lower Extreme range (i.e., better than 0.1% of same-aged peers). Id.

58. The student's spelling skills are in the Lower Extreme range, yielding a performance better than 2% of same-aged peers. The student's written expression skills are also in the Lower Extreme range, yielding a performance better than 0.3% of same-aged peers. P 11-10.

59. Academia is very stressful and anxiety producing for the student. P 11-11 – 11-13, 11-15; Testimony of Parent,

60. The student has a Reading Disorder, Math Disorder, Disorder of Written Expression, and Generalized Anxiety Disorder. P 11-15, 11-18.

61. A speech and language evaluation of the student was completed on January 9, 2009. P 6.

62. The student is able to listen and follow directions, complete assignments, recall important facts and information, summarize or paraphrase importation information, and use language to give and receive information. P 6-1, 6-3 – 6-4; Testimony of

63. The student's higher language skills – such as sequencing information, understanding and using vocabulary, making inferences, predicting outcomes, and drawing conclusions from presented material – are weak. P 6-1 – 6-4.

64. The student's ability to communicate is age-appropriate. P 6-2.

65. The student demonstrates a mild language disorder and the student is not in need of direct speech and language services. The student demonstrates “functional receptive and expressive language skills within the classroom setting.” P 6-5.

66. The student would benefit from vocationally-based language tasks in her program to prepare her for employment. Instruction in employment interviews, job inquiry and applications skills, and workplace vocabulary terms are warranted. P 6-5.

67. A social history of the student was completed in early January 2009. P 8.

68. The student has an eight month son. P 8-1; Testimony of Student, Parent.

69. The student wants to earn a GED Diploma. P 8-2; Testimony of Student, Parent, Knight.

70. The student is determined to “finish her schooling, though she defines this as earning a GED [Diploma].” P 8-2; See Testimony of Student.

71. The student would benefit from attending a full-time special education school that has a program for children with learning disabilities and can provide vocational training. P 8-2, 8-3; P 11-19; Testimony of Zeitlin.

72. Neither the student nor her special education teacher believes the student will be able to function in a traditional school environment. Testimony of Student.

73. An IEP Team meeting was held on February 26, 2009. However, an IEP was not developed for the student. The parties agreed to meet again, but as of March 11, 2009, a second meeting had not been held. Stipulation of the Parties, HO 6.

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. Child Find

The first issue to be determined is whether Respondent violated the child find provision, 34 C.F.R. § 300.111, of the IDEIA when it failed to evaluate the student and develop an IEP for the student since the 2006 – 2007 school year.

The IDEIA mandates that an LEA identify, locate, and evaluate all children with disabilities residing in the State, including children who are homeless, migrants, or un-enrolled. See 20 U.S.C. § 1412 (a)(3); 34 C.F.R. § 300.111 (a)(i), (c)(2). This obligation also extends to children who are suspected of having disabilities. 34 C.F.R. § 300.111 (c)(1); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008); see also District of Columbia v. Abramson, 493 F. Supp. 2d 80 (D.D.C. 2007). There is no question that Respondent knew, or should have known, that the student was a child with a disability and that she continued to reside in the District of Columbia.

The student's last known IEP is dated June 6, 2006. HO 7. Upon enrolling the student in PCS, the parent informed school personnel that the student required special education services and provided the school with a copy of the student's IEP and evaluations. Testimony of Parent. PCS, although a charter school, is not its own LEA for special education purposes (Stipulation of the Parties, HO 6) and Respondent had the ultimate responsibility to make a FAPE available to the student while she was attending PCS. It did not. Testimony of Parent.

For the 2007 – 2008 school year, the student presented herself at the door steps of Respondent's SHS and informed the school principal that she was a child with a disability who had previously been provided with special education services by Respondent. Testimony of Parent. Rather than embrace the student, Respondent turned the student away asking the parent to go out and locate a copy of the student's IEP; the student would not be enrolled in the school without it. Id. The parent was not able to produce a copy of the IEP, and the student was left to sit at home for an entire school year.⁹

IDEIA mandates that the LEA identify, locate, and evaluate all children with disabilities residing in the State. Here, the student appeared before the school principal and identified herself as a child with a disability. Rather than enroll the student in the school while the special education file was located or, simply have the student reevaluated, the principal thought it more prudent to shut the school house doors on the student.

⁹ I note that Respondent's Custodian of Records fared no better than the parent and was not able to produce any records pertaining to the student. The June 6, 2006 IEP, HO 7, appeared after Respondent's counsel made additional inquiries about the student's educational records, but the parties agreed that the IEP appears to be a draft rather than what ultimately was recommended for the student, if anything at all.

In January 2009, the student again was not allowed to enroll in SHS because the parent had to first meet with a special education teacher who, during the two visits the parent made to the school, was not present. Testimony of Parent. Once more the student appeared before Respondent's SHS, identified herself as a child with a disability, and the school failed to evaluate her to determine whether she was in need of special education and related services.

I find that Respondent failed in its child find responsibilities towards the student. 34 C.F.R. § 300.111.

2. Failure to Provide FAPE Since the 2006 – 2007 School Year

The central purpose of the IDEIA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformity with a written IEP (i.e., FAPE). 20 U.S.C. §§ 1400 (d)(1)(A), 1401 (9)(D); 1414 (d); 34 C.F.R. §§ 300.17 (d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005), Rowley, 458 U.S. at 179-81.

A FAPE is offered to a child with a disability when the LEA complies with the IDEIA procedural requirements and the child's IEP is reasonably calculated to enable the student to receive educational benefits. Rowley, 458 U.S. at 206-07. However, not all procedural errors render an IEP inadequate. A procedural violation alone without a showing that the child's education was substantively affected, does not establish a failure to provide a FAPE. See Lesesne v. Dist. of Columbia, 447 F.3d 828 (D.C. Cir. 2006); Pabo v. Dist. of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008); see also Blackman v. Dist. of Columbia, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (Noting that a procedural violation of the IDEIA "can itself constitute the denial of a free appropriate [public] education."). A

hearing officer may find a child did not receive 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.

34 C.F.R. § 300.513 (a)(2).

Accordingly, the IDEIA directs that the undersigned Hearing Officer render a decision on whether the student received a FAPE on substantive grounds. 20 U.S.C. § 1415 (f)(3)(E)(i). FAPE is offered to the child "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at 203. IDEIA does not specify the specific level of educational benefits that must be provided through the child's IEP, nor is the LEA required to maximize the child's potential. Id. at 189, 199.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320 (a)(1)), establishes annual goals related to those needs (34 C.F.R. § 300.320 (a)(2)), and provides for the use of appropriate special education and related services (34 C.F.R. § 300.320 (a)(4)). The program must also be provided in the least restrictive environment. 20 U.S.C. § 1412 (a)(5); 34 C.F.R. §§ 300.114 (a)(2), 300.116 (a)(2).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief. See Shaffer v. Weast, 546 U.S. 49, 51 (2005) (finding it improper to assume that every IEP is invalid until the LEA demonstrates otherwise).

The second issue presented for consideration is whether the June 6, 2006 IEP is reasonably calculated to enable the student to receive educational benefits. See Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). I find that IEP is wholly inadequate to meet the educational and socio-emotional needs of the student. The IEP fails to include any description of the student's present levels of educational performance (34 C.F.R. § 300.320 (a)(1)), fails to establish any annual goals related to the student's needs (34 C.F.R. § 300.320 (a)(2)) and, other than recommending 10 hours of specialized instruction in the resource room classroom, fails to provide for the use of appropriate special education and related services (34 C.F.R. § 300.320 (a)(4)). See HO 7. Whether an IEP Team meeting even took place is debatable, as not one signature is included on the IEP. See HO 7-1.

Neither did Respondent hold an IEP Team meeting for the student during the 2007 – 2008 school year (issue three) or at the commencement of the 2008 – 2009 school year (issue four). Stipulation of the Parties, HO 6. Although an IEP Team meeting was held on February 26, 2009, an IEP was not developed for the student. Stipulation of the Parties, HO 6

Accordingly, for the reasons stated above, I find that Petitioners have met their burden of demonstrating that the student was denied a FAPE during the 2006 – 2007, 2007 – 2008, 2008 – 2009 school years.

3. Placement at Seeds of Tomorrow

Petitioners seek an order placing the student at _____ at Respondent's expense. I find that the placement is warranted and necessary for the

student to obtain FAPE until such time as Respondent has developed an appropriate IEP for the student and has identified an appropriate placement for the student.

Before 1997, IDEIA was silent on the subject of private school reimbursement. However, an LEA was required to reimburse parents for their tuition payment to a private school for the services obtained for the student by his or her parents if the services offered by the LEA were inadequate or inappropriate, the services selected by the parents were appropriate under the Act, and equitable considerations supported the parents' claim. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 (1985). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by an LEA as an available remedy in a proper case. Burlington, 471 U.S. at 370-71. "Reimbursement merely requires [an LEA] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Burlington, 471 U.S. at 370-71; see also 20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148. The mere fact that the state educational agency and/or the LEA has not approved the private school placement does not bar the parents from reimbursement. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993).

Prior to 1997, Courts granted private school reimbursement under principles of equity pursuant to 20 U.S.C. § 1415 (i)(2)(C). See Burlington, 471 U.S. at 370 ("[W]e are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy...."). 20 U.S.C. § 1415 (i)(2)(C) provides, "In an action brought under this paragraph, the court ... shall grant such relief as the court determines is appropriate."

In 1997, Congress amended the IDEA to include a new section entitled, "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412 (a)(10)(C). Now, with respect to children with disabilities enrolled by their parents in private schools when FAPE is at issue, IDEIA provides, in part:

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility....

(b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

(c) Reimbursement for private school placement. If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents

did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148 (emphasis added).

Given the statutory language, the question arises whether private school reimbursement continues to be an available remedy under the general principles of equity pursuant to 20 U.S.C. § 1415 (i)(2)(C), and consistent with Burlington, for children who have never received special education and related services from a public agency. It appears, given the present case law, that 20 U.S.C. § 1412 (a)(10)(C)(ii) does not create a categorical bar to recovery of private school reimbursement. Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007) (per curiam); Forest Grove Sch. Dist. v. T.A. (9th Cir. 2008), cert. granted, (U.S. Jan. 16, 2009) (No. 08-305); Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3248 (U.S. Oct. 23, 2006) (No. 06-580), cert. denied, 128 S. Ct. 436 (2007); see also Letter to Luger, 33 IDELR 126 (OSEP 1999).

Neither is a court or hearing officer prevented from ordering a school district to develop and implement at public expense an IEP placing the child in a private school without the parents first having to incur the costs associated with the placement. See Burlington, 471 U.S. at 370. In Burlington, the Court made clear that –

In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, *it seems clear beyond cavil* that 'appropriate' relief would

include a *prospective injunction* directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

Id. (emphasis added).¹⁰

In consideration of this analysis, and as discussed in paragraph 2 *supra*, I have determined that Petitioners met their burden of establishing that Respondent failed to offer the student a FAPE. A FAPE is defined as the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Bd. of Educ. v. Rowley, 458 U.S.176 (1982). An appropriate educational program begins with an IEP that accurately reflects the results of the various evaluations that the student has undergone and that identifies the student’s needs based on those evaluations. 34 C.F.R. § 300.320 (a)(1). The IEP must also establish annual goals related to the identified needs, 34 C.F.R. § 300.320 (a)(2), and provides for the use of appropriate special education and related services, 34 C.F.R. § 300.320 (a)(4).

The June 6, 2006 IEP fall short of what is required, and Respondent failed to develop an IEP for the student for the 2007 – 2008 school year or the 2008 – 2009 school year.

The inquiry, however, does not stop there, and Petitioners bear the burden of demonstrating that the services selected by the parent, i.e., _____, are appropriate under the Act, and that equitable considerations support the parent’s claim.

20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359,

¹⁰ Burlington is often associated with tuition reimbursement. However, although the question presented to the Burlington Court was whether retroactive reimbursement was an available and appropriate relief that a court could award, the Court’s holding is anchored in the Act’s granting to the courts broad equitable power, which permits both tuition reimbursement and a “prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.” Burlington, 471 U.S. at 370. The mere fact that the Court’s discussion centered on reimbursement is not to the exclusion of the other.

369-70 (1985). Here, the hearing record does support a finding that is appropriate for the student, and that it is the least restrictive environment (hereinafter, "LRE"). 20 U.S.C. § 1412 (a)(5); 34 C.F.R. §§ 300.114 (a)(2), 300.116 (a)(2).

The collective agreement of the individuals who evaluated the student, and those who testified at the hearing, is that the student would benefit from a vocational program, in addition to direct instruction in reading, math, and writing. P 6-5; P 8-2, 8-3; P 11-19; Testimony of Zeitlin, . In this regard, the speech and language evaluator who tested the child on January 9, 2009 recommended that the student be provided with a vocationally-based language environment that would prepare the student for employment. P 6-5. Instruction in employment interview, inquiry and applications skills, and workplace vocabulary were among the recommendations of the speech and language evaluator for the student. *Id.* Counseling was recommended by Dr. Zeitlin to address the student's anxieties related to her academic difficulties. P 11-18.

provides the student with the transition services she would need to be placed in a job or in a vocational program. Testimony of ; P 19-2. The student is also provided with direct instruction in reading, math, and writing to increase her academic skills to enable her to enroll, and be successful in, a GED program, the student's ultimate goal. Testimony of . Counseling is provided for one hour per week to address the student's anxieties related to her educational deficiencies. Testimony of

The program at is consistent with the intent of IDEIA. The purpose of the IDEIA is to ensure that all children with disabilities have available to them a FAPE, which not only emphasizes special education and related services, but prepare

them for further education, employment, and independent living. 20 U.S.C. 1400(d); 34 C.F.R. § 300.1 (a). Recognizing that not all children with disabilities are able to obtain, or will elect to pursue, a baccalaureate or advanced degree, Congress defined special education to include vocational education. 20 U.S.C. 1401 (29); 34 C.F.R. § 300.39 (a)(2)(iii).

In developing each child's IEP, the IEP Team must consider the academic, developmental, and *functional needs* of the child. 34 C.F.R. § 300.324 (a)(1)(iii). Moreover, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and independent living; and the transition services needed to assist the child in reaching those goals. 20 U.S.C. 1414 (d)(1)(A) and (d)(6); 34 C.F.R. § 300.320 (b)(1) and (b)(2).

Transition services is defined as –

a coordinated set of activities for a child with a disability that—

(1) Is designed to be within a results oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) *Transition services* for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

20 U.S.C. 1401(34); 34 C.F.R. § 300.43 (a)(1), (a)(2), and (b).

The mere fact that _____ is not approved by the SEA, or provides the student with an opportunity to obtain a high school degree, does not prohibit the undersigned from placing the student in the program. 20 U.S.C. § 1412 (a)(10)(C)(ii) provides –

A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148. Neither am I convinced that the parent had to first exhaust public school options, or demonstrate that the school district is incapable of providing the student an appropriate education, before placing the student in

While IDEIA has a structural preference for special education in public schools, the Act does not foreclose placement in a private program, and the undersigned is free to award placement in _____ . See Draper v. Atlanta Independent School System, 518 F.3d 1275 (11th Cir. 2008).

Petitioners have met their burden of demonstrating that the services selected by the parent are appropriate under the Act. I further find that equitable considerations support the student's placement at _____ . Since the 2006 – 2007 school year, Petitioners have made several attempts to obtain the services that the student desperately needs and, at each turn, Respondent simply failed to act, opting to allow the

student to languish in school (PCS) or at home. Incredibly, when the parent enrolls the student in a program that is responsive to the student's needs (i.e.,), but that lacks the SEA or LEA's imprimatur, Respondent comes before the undersigned citing chapter and verse of the very statute that it felt it could ignore with impunity for the past three years in an attempt to once again deny the student access to educational benefit. This tragic tale ends here.

4. Compensatory Education

The final issue is whether the student is entitled to compensatory education services for Respondent's prolonged denial of FAPE to the student.

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to "grant such relief as the court determines appropriate," 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3), when a child with a disability has previously been denied FAPE. See Burlington Sch. Comm. v. Massachusetts Dept. of Educ., 105 S. Ct. 1996 (1985); Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005); Letter to Kohn, 17 IDELR 522 (OSEP 1991); See also Letter to Riffel, 34 IDELR 292 (OSERS 2000). Compensatory education effectuates a child's ability to receive FAPE by providing the FAPE by which the child was originally entitled to receive. Letter to Kohn, 17 IDELR 522 (OSEP 1991). "Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services ... to be provided prospectively to compensate for a past deficient program.'" Reid, 401 F.3d 516 (D.C. Cir. 2005) citing G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003).

An award of compensatory education “must be reasonably calculated to provide the educational benefits that likely would have accrued.” Reid, 401 F.3d at 524. “This standard ‘carries a qualitative rather than quantitative focus,’ and must be applied with ‘[f]lexibility rather than rigidity.’” Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland, 555 F. Supp. 2d 130 (D.D.C. 2008) (quoting Reid, 401 F.3d at 524). In crafting the remedy, the undersigned Hearing Officer is charged with the responsibility of engaging in “a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student’s unique needs.” Mary McLeod, 555 F. Supp. 2d 130 (citing Reid, 401 F.3d at 524). For some students, the compensatory education services can be short, and others may require extended programs. Id.

Reid rejects a “cookie-cutter approach,” i.e., an hour of compensatory instruction for each hour that FAPE. Reid, 401 F.3d at 523. However, while there is no obligation, and it might not be appropriate to craft an hour for hour remedy, an “award constructed with the aid of a formula is not *per se* invalid.” Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 124 (D.D.C. 2008). Again, the inquiry is whether the “formula-based award ... represents an individually-tailored approach to meet the student’s unique needs, as opposed to a backwards-looking calculation of educational units denied to a student.” Id.

The record evidence supports that the student has been denied a FAPE as early as the 2006 – 2007 school year, and would be entitled to compensatory education services as a result of the denial of FAPE. IDEIA grants Petitioners the right to file a due process complaint on any matters relating to the identification, evaluation or educational

placement of the child with a disability, or the provision of a FAPE to the child. 20

U.S.C § 1415 (b)(6); 34 C.F.R. § 300.507 (a).

The due process complaint, however, must allege a violation that occurred not more than two years before the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 34 C.F.R. § 300.507(a)(2); see also 34 C.F.R. § 300.511(e)¹¹. There are only two exceptions to the timeline. See 34 C.F.R. § 300.511(f). Specifically, the two year timeline does not apply to a parent if the parent was prevented from filing a complaint due to

- (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
- (2) The LEA's withholding of information from the parent that was required under [the IDEIA] to be provided to the parent.

Id. Neither the continuing violations nor the equitable tolling doctrines apply to IDEIA claims. See, e.g., Evan H. v. Unionville-Chadds Ford Sch. Dist., 108 LRP 64922 (E.D. Pa 2008). Instead, the limitations period can be extended only if one of the exceptions listed *supra* apply.¹² Id. The failure to provide the parent with IDEIA's procedural safeguards notice is an example of the LEA withholding of information from the parent.
Id.

Respondent maintains that any compensatory education award should be limited to the period from January 22, 2007 forward, since the Complaint was filed on January

¹¹ 34 C.F.R. § 300.511(e) is slightly different in language than 34 C.F.R. § 300.507(a)(2). The former uses the phrase "request an impartial hearing on their due process complaint within two years of the date the parent...knew or should have known about the allege action that forms the basis of the due process complaint....," while the latter does not address by when a parent must request a due process complaint but does say that the complaint "must allege a violation that occurred not more than two years before the date the parent...knew or should have known about the allege actions that forms the basis of the due process complaint...."

¹² See also the comments to the IDEIA regulations, which explicitly state that the two exceptions to the limitations period "do not include when a violation is continuing." Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46540, 46697 (August 14, 2006).

22, 2009. Petitioners aver that the LEA withheld information from the parent by not providing her with either procedural safeguards or prior written notice. Alternatively, Petitioners maintain that the doctrine of continuing violation applies. The continuing violation doctrines does not apply, but I do find that, in the absence of any contradictory evidence, Respondent has not provided Petitioners with their procedural safeguards and/or prior written notice since the 2006 – 2007 school year.

Nonetheless, although I believe that the student is entitled to compensatory education services, Petitioners have not met their burden of demonstrating that the compensatory education plan submitted for consideration is “reasonably calculated to provide the educational benefits that likely would have accrued.” Reid, 401 F.3d at 524. Although Dr. Zeitlin testified that she supported the proposed plan, she provided no explanation on how the recommended hours were determined or how the listed reading and math programs were consistent with her own recommendations that the reading curriculum meets the standards set forth by The National Reading Panel of 2000 and that the student be provided with individual math tutoring. Testimony of Zeitlin; See P 11-15; 11-17.

In this absence of an appropriate compensatory education plan, Petitioners request for compensatory education services is denied.

ORDER

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

1. Respondent shall place and fund the student in the _____ at _____ . retroactive to December 10, 2008, and until such

time as Respondent has developed an appropriate IEP for the student and has identified an appropriate placement for the student.

2. Respondent shall provide the student with transportation services to and from her home and the _____ at _____

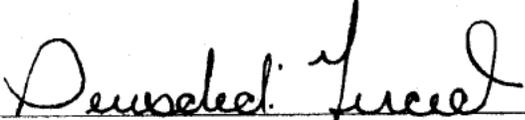
3. Within 10 school days, Respondent shall convene an IEP Team meeting at the _____ at _____, Inc. to consider all current evaluations, assessments, and any other pertinent information, discuss and determine the student's special education and related services needs, including her need for extended school year services, and revised the student's IEP accordingly. Respondent shall consider providing transitional services to the student through the _____ at _____

4. Petitioners request for compensatory education services is denied.

5. Any delay in meeting any of the deadlines in this Order because of an act or acts of Petitioners and/or their representatives, will extend the deadlines set herein by the number days attributable to Petitioners and/or Petitioners' representatives' actions. Respondent shall document any delays caused by Petitioners' and/or Petitioners' representatives.

IT IS SO ORDERED.

DATED: March 16, 2009


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NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 90 days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. § 1415(i)(2)(B).