DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE STUDENT HEARING OFFICE
2011 MAR -7 AM 9:55

Parent, on behalf of the Student,[1]

Petitioner,

v.

The District of Columbia Public Schools ("DCPS"), on behalf of

Respondent.

Date Issued: March 5, 2011
Hearing Officer: Ramona M. Justice
Case No:
Hearing Room: Room 2009

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17; reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; Title 38 of the D.C. Code, Subtitle VII, Chapter 25; and Chapter 30, Title 5-E of the District of Columbia Municipal Regulations ("DCMR").

II. PROCEDURAL HISTORY

On December 30, 2010, parent, through her Attorney, filed an "Administrative Due Process Complaint Notice", on behalf of the student, alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS" or "Respondent", denied the student a free appropriate public education (FAPE), because it failed to:

1) Properly convene an Individualized Education Program (IEP) Team; at the December 16, 2010 IEP team meeting;

2) Develop an *appropriate Individualized Education Program (IEP)* for the student on December 16, 2010, because the ***level of specialized instruction services*** recommended in the student's IEP, is insufficient to enable him to receive a free appropriate public education;

[1] *Personal identification information is provided in Appendix A.*

3) Provide the student an *appropriate IEP* on December 16, 2010, because nature and severity of the student's disability is such that education of the student in the general ***education setting***, as recommended in the IEP, cannot be accomplished satisfactorily, even with the use of supplementary aids and services; and

4) Issue an appropriate *prior to action notice* to the parent, in accordance with the notice requirements of IDEA, at 34 C.F.R. §300.503(a).

The Petitioner seeks relief in the form of an Order issued by the Hearing Officer, finding that the DCPS denied the student a free appropriate public education by failing to provide the student an IEP that is reasonably calculated to provide the student educational benefit; and a finding that the Respondent failed to provide the student an appropriate placement.

The Petitioner requests that the Hearing Officer issue an order requiring that within five (5) business days of this decision and order, the DCPS shall reconvene the student's MDT/IEP team meeting, with all IEP team members present, to revise the student's IEP to include twenty-seven (27) hours of specialized instruction; and one hour of individual psychological counseling services, weekly.

The Petitioner requests that the Hearing Officer issue an order requiring the DCPS to fund the student's placement, at the of Lanham, Maryland, or including transportation; for the remainder of the 2010/11 school year.

The Petitioner also requests compensatory education services from the beginning of the 2010/11 school year through the date of this decision; to compensate the student for DCPS' failure to provide the student an appropriate IEP and placement; and that the Hearing Officer issue an order requiring the DCPS to fund the student's compensatory education services.

The due process complaint was assigned to this Hearing Officer on December 30, 2010; and on January 7, 2011, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for January 14, 2011 at 4:00 p.m... The Hearing Officer also issued an Order requiring the parties to notify the Hearing Officer of the date, time, and outcome of the resolution meeting.

The prehearing conference was rescheduled to accommodate the schedules of the parties; and held on January 31, 2011, at approximately 4:30 p.m.. On February 1, 2011, the Hearing Officer issued a "Prehearing Order", summarizing the issues in the complaint, matters discussed, and confirming the due process hearing for March 4, 2011, from 9:00 a.m. to 5:00 p.m..

The due process hearing convened on March 4, 2011, at 9:00 a.m., at 810 First Street, N.E., 2nd Floor, Washington, D.C... The hearing was closed to the public, pursuant to the parents' request; and each party was represented by counsel. Both parties provided an opening statement. As a preliminary matter, the Petitioner invoked the rule on witnesses. There were no other preliminary matters for discussion or for the hearing officer to decide.

The Petitioner offered into evidence Petitioner's Exhibits 1-39; and the Respondent offered into evidence Respondent's Exhibits 1-10; accompanied by witness lists dated February 25, 2011. The Respondent objected to Petitioner's Exhibit s 6, 7, 8, 9, 12, and 13, on the grounds that the exhibits were not relevant to the issues before the Hearing Officer; and the exhibits predated a July 14, 2010 Settlement Agreement.

After hearing arguments from both parties, the Hearing Officer sustained the Respondent's objection on the grounds of relevancy, excluding from the record Petitioner's Exhibits 6, 7, 8, 9, 12, and 13. Receiving no further objections, the Hearing Officer admitted into the record as evidence, Petitioners' Exhibits 1-5, 10, 11, 14-39; and the Respondent's Exhibits 1-10.

The Petitioner's witnesses included the parent, student, student's Education Advocate, the Administrator, from of Prince George's County, Maryland, and a Psychologist from Parker Diagnostic Solutions. The Petitioner offered the Clinical Psychologist as an expert in Clinical Psychology, and in conducting evaluations; which the Respondent objected. After hearing arguments from the parties, the Hearing Officer decided that the Clinical Psychologist would not be admitted as an expert in the areas proffered by the Petitioner; and that due weight would be provided to the number of evaluations conducted by the witness, and experience analyzing evaluation data. The Respondent's witnesses included the student's special education teacher, and the Special Education Coordinator/Student's Teacher, from the student's current school.

III. BACKGROUND

The student is years of age; and until very recent, was a homeless resident of the District of Columbia. The student attends a District of Columbia public charter high school, which he began attending during the 2010/11 school year. The school adopts an inclusion approach to teaching, where special education students receive specialized instruction in the general education classroom, with nondisabled students.

Prior to attending the public charter school, the student attended a District of Columbia public school. On ***June 18, 2010***, while attending the elementary school, the Respondent developed an IEP for the student, prescribing 15 hours of specialized instruction, per week, *outside the general education setting*. On ***December 16, 2010***, the Respondent developed an IEP for the student, prescribing 20 hours of specialized instruction services, weekly, *in the general education setting*.

On December 30, 2010, the parent, through her Attorney, filed this due process complaint; challenging the level of services in the December 16, 2010 IEP; and the student's placement, at the public charter high school, during the 2010/11 school year.

IV. ISSUES

The issues before the Hearing Officer are as follows:

(1) Whether the District of Columbia Public Schools failed to develop an appropriate Individualized Education Program (IEP) for the student on December 16, 2010, because the student requires a full-time special education program; and the ***level of specialized instruction services*** prescribed in the student's IEP, is insufficient to enable the student to access the general education curriculum and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §§300.320, 300.324 (a)(1)(iv), and 300.513?

(2) Whether the District of Columbia Public Schools failed to develop an appropriate Individualized Education Program (IEP) for the student on December 16, 2010, because the IEP recommends education of the student in the general education setting, although the nature and severity of the student's disability is such that education of the student in the general ***education setting*** cannot be accomplished satisfactorily, even with the use of supplementary aids and services; and the student requires education outside the general education setting; in violation of the IDEA, at IDEA, at 34 C.F.R. §§34 C.F.R. §§300.320, 300.324 (a)(1)(iv), and 300.513?

(3) Whether the District of Columbia Public Schools failed to provide the student an appropriate placement during the 2010/11 school year, because the ***location of services*** identified in the student's December 16, 2010 IEP, is unable to provide the student the full-time special education program, outside general education, which he requires to access the general education curriculum and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §§300.114(a)(2)(ii), 300.116 (a)(2) (b)(2); and 300.513?

V. CREDIBILITY DETERMINATIONS

The Hearing Officer finds that the testimony of all witnesses at the hearing was credible; and the Respondent presented no witness testimony that contradicted the testimony of Petitioner's witnesses.

VI. 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 disabled and eligible to receive special education services, under the disability classification of Multiple Disabilities (MD), including Other Health Impaired (OHI), specifically identified as attention deficit hyperactivity disorder (ADHD), inattentive type; and specific learning disabled (LD), in reading, mathematics, and written expression.[2]

[2] Petitioner's Exhibit 10; testimony of Clinical Psychologist. and Petitioner's Exhibit 15, page 1.

2. The student was determined disabled and eligible to receive special education services under the IDEA, while in the 2nd grade; and since that time, struggles with inattentiveness, memory, comprehension, staying on task, completing class and homework assignments; and academically.[3]

3. The student is currently years of age; and a grade student, at a District of Columbia Public Charter High School; which he began attending in October, 2010.[4] The public charter high school adopts an inclusion model in educating special education students, where special education students receive specialized instruction in the general education classroom, with nondisabled students.[5] There are approximately fifteen (15) students, in the student's classes at the charter school.[6]

   During the 1st, 2nd, and 3rd quarters of the 2010/11 school year, the student struggled academically;[7] and according to the student, he does not comprehend the information received during class, homework or class assignments, and could benefit from more individualized classroom support.[8]

4. Prior to attending the public charter high school, the student attended a District of Columbia public school.[9] On June 18, 2010, while attending the elementary school, the Respondent developed an IEP for the student prescribing 15 hours of specialized instruction, weekly, outside the general education setting.[10] The student struggled academically, and his inattentiveness had an adverse impact on his learning.[11]The student failed the 8th grade, however, was advanced to the grade, after successful completion of Summer School, at the

5. On ***March 22, 2010***, while attending the elementary school, the Petitioner, through her Attorney requested reevaluation of the student to include: Comprehensive Psychological and Speech/Language evaluations; to address parent concerns regarding the student's behavior and speech/language needs.[13] Dissatisfied with the evaluations completed by the Respondent, the Petitioner requested independent Comprehensive Psychological and Speech/Language evaluations; and an independent Functional Behavioral Assessment.[14]

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[3] Testimony of parent Petitioner's Exhibit 1, and Respondent's Exhibit 5, page 3.
[4] Testimony of parent, student, and Education Advocate. Respondent's Exhibit 2, and Petitioner's Exhibit 1.
[5] Petitioner's Exhibit 25, page 2.
[6] Testimony of student, special education teacher, and special education coordinator.
[7] Petitioner's Exhibits 27 and 28.
[8] Petitioner's Exhibit 27.
[9] Testimony of parent.
[10] Respondent's Exhibit 3.
[11] Testimony of parent and Petitioner's Exhibit 16, page
[12] Petitioner's Exhibit 16, page 2.
[13] Testimony of Education Advocate.
[14] Petitioner's Exhibit 1.

6. On ***July 13, 2010***, an independent ***Speech and Language Evaluation*** was completed by Parker Diagnostic Solutions, to assess the student's communication skills and determine the student's current level of performance and the impact that his communication skills, if any, had on his academic performance.[15] The evaluator determined that the student's communication abilities were in the overall average range; and weaknesses were displayed across specific language areas including difficulty analyzing and interpreting sentences; however, the student did not require speech and language services.[16]

7. On ***July 16, 2010***, a ***Functional Behavioral Assessment (FBA)*** was completed by *Parker Diagnostic Solutions*, to identify behaviors that influence the student's academic performance in school.[17] At the time of the evaluation, the student was in the 8th grade. [18] The evaluator determined that the student had difficulty with attention, was often off task in the classroom, and mostly spoke to peers and played around with friends during class instruction; which the student reported was because he failed to comprehend the school work.[19]

   The evaluator also stated that the student's admission suggests that the student may evidence more success if placed in a ***classroom with a low student to teacher ratio***; a review of the August 2, 2010 Comprehensive Psychological Evaluation suggests that the student presents with ***difficulties in all academic areas,*** requiring remediation; and the student may benefit from an ***increase in specialized instruction services***.

   The evaluator recommended a Behavioral Intervention Plan (BIP), to address the student's inattention/off task behavior, and inability to complete independent tasks due to low academic skills, as well as, inattention; consistent rewards; interventions and accommodations; counseling, a Psychiatric consultation; and consequences for specific behavior.[20]

8. On ***July 20, 2010***, an independent ***Comprehensive Psychological Evaluation*** was completed, to assess the student's cognitive, academic, and personality functioning; and identify social and emotional factors that impact the student's ability to perform effectively in the classroom.[21] At the time of the evaluation, the student was years, and 7 months in age.[22]

   The parent informed the evaluator that the student was determined eligible for special education services, during the 2nd grade, and his disability classification was learning disabled, however, for many years she had concern regarding the student's level of distractibility and attention difficulties.[23]

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[15] Petitioner's Exhibit 15, page 1.
[16] Petitioner's Exhibit 15, page 5 of 5.
[17] Petitioner's Exhibit 17, page 1.
[18] Petitioner's Exhibit 17, page 1.
[19] Petitioner's Exhibit 17, page 9 of 9.
[20] Petitioner's Exhibit 17, page 9 of 9.
[21] Petitioner's Exhibit 16, page 1.
[22] Id.
[23] Petitioner's Exhibit 16, page 6.

The parent also expressed concern regarding the size of the student's class, and that it is too large; and the student failed to receive a sufficient level of specialized instruction support.[24]

The student reported that he failed to receive adequate or a sufficient level of support in the classroom, at , that the work was "too hard", and therefore, he would often talk instead of attempting to complete the assignments.[25] The student also reported that he is *unable to solve difficult problems independently*; and usually teachers fail to offer him assistance.

In assessing the student's cognitive, intellectual and academic functioning, the evaluator determined that, overall the student's general intellectual ability is in the low average range when compared to others in his age ranged, indicating that intellectually the *student will have difficulty keeping up with many of his same aged peers on a variety of verbal and non-verbal reasoning tasks; and cognitive tasks;* and received low scores in reading, broad written language, and oral language; and a score of low average in broad math.[26] According to the Woodcock Johnson III Tests of Achievement, the student performed 2nd and 5th grade levels across most areas; received a standard IQ score of 4.4; and remains 4-5 school years below grade level.[27]

The evaluator confirmed the student's prior diagnosis of ADHD, predominantly inattentive type, indicating that this disorder is characterized by symptoms of inattention, and distractibility, which have persisted for at least 6 months to a degree that is maladaptive and inconsistent with the student's developmental level.[28]

The evaluator also determined that the following symptoms of inattention have persisted: failing to pay close attention to details or making careless mistakes in schoolwork; having trouble sustaining attention on academic tasks; not following through on instructions and failing to finish homework or chores; having difficulty organizing tasks and activities; avoiding tasks that require sustained mental effort such as school work and home work; losing necessary things, such as class notes; and that the student is easily distracted by extraneous stimuli.[29]

The evaluator determined that these symptoms were prevalent before the age of 7, and the impairment is prevalent in at least two settings (home and school); and the disability causes significant impairment in social and academic functioning.[30] The evaluator also provided the student a DSM Diagnosis of Attention Deficit Hyperactivity Disorder (ADHD), inattentive type; and a Learning Disability in all areas (Reading, Mathematics, and Written Language).[31]

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[24] Petitioner's Exhibit 16, page 3.
[25] Petitioner's Exhibit 16, page 13.
[26] Petitioner's Exhibit 16, page 7.
[27] Petitioner's Exhibit 16, page 17.
[28] Petitioner's Exhibit 16, page 14.
[29] Petitioner's Exhibit 16, page 14.
[30] Petitioner's Exhibit 16, page 14.
[31] Petitioner's Exhibit 16, page 15.

The evaluator concluded that the student has difficulties in all areas (Reading, Mathematics, and Written Language) and that these difficulties will impede his success in the classroom, without the necessary specialized education supports.[32] The evaluator also concluded that the student's poor academic scores and diagnosis of ADHD support the student's need for specialized instruction; the student requires appropriate classroom accommodations, ***academic concepts to be taught in a class in which he can receive one on one support***, to assist in his understanding of the material; and that the MDT should ***strongly*** consider an ***increase in the amount of academic support*** the student received at that time (15 hours of specialized instruction, weekly).[33]

The evaluator recommended interventions to remediate the student's difficulties with written language, mathematics, reading, reading comprehension; and a Psychiatric consultation, to assess the student's need for medication to address his attention difficulties; and counseling.[34] During the hearing the evaluator testified that the Comprehensive Psychological and Functional Behavioral Assessments, includes information supporting the student's need for a full-time special education program, outside general education; and that failure to state such with more specificity in the evaluations, was an oversight.[35]

9. On ***August 2, 2010***, a ***Functional Behavioral Assessment (FBA)*** was completed by *Interdynamics, Inc.*, to assess the impact that the student's behavioral difficulties has on his learning.[36] The evaluator determined that the student has average to below average cognitive functioning; has difficulties in math, reading, and written expression, which is secondary to a prior diagnosis of ADHD; inattention and distractibility in class; a history of absenteeism; failure to complete class work and homework; difficulty comprehending school work; and failing grades.[37]

   The evaluator determined that the student appeared to struggle with managing the symptoms of ADHD, particularly inattention, which interferes with his ability to learn.[38] The evaluator stated that the student is likely to respond positively to ***1:1-instruction*** with a teacher within a framework that provides him the freedom to work independently; and ***more structure and supervision*** to ensure that the student attends classes and completes class work and homework.

   The evaluator recommended a continuation of special education services; ***tutoring or one on one instruction***; a Psychiatric Evaluation to determine his need for medication to manage his ADHD symptoms; individual or group counseling; independent-

[32] Petitioner's Exhibit 16, page 15.
[33] Id.
[34] Petitioner's Exhibit 16, page 16.
[35] Testimony of Clinical Psychologist.
[36] Petitioner's Exhibit 18.
[37] Petitioner's Exhibit 18, page 4 of 5.
[38] Id.

rewards and adult approval; increased structure and supervision, to ensure that he attends classes and completes class work and homework; and a behavioral intervention plan developed collaboratively by the student's special education coordinators, counselors, teachers, and parents.[39]

10. On ***November 15, 2010***, the Respondent convened a Multidisciplinary Development Team (MDT) meeting, to review independent Comprehensive Psychological Evaluation, Speech-Language Evaluation, and Functional Behavioral Assessment (FBA).[40]

    The team discussed the evaluations, and student's June 18, 2010 IEP, however, due to technical difficulties with the Respondent's database, the team was unable to revise the student's IEP; the student's placement or compensatory education services was not discussed; and the team agreed to adjourn and reconvene the meeting at a later date and time to finalize the student's IEP, discuss the student's placement, and compensatory education services.[41]

    On this date, the Respondent emailed a Letter of Invitation to the student's Education Advocate, and Petitioners Attorney, proposing dates to reconvene the IEP team meeting, for the purpose of completing the student's IEP.[42] The Respondent also emailed to the student's Education Advocate and Petitioner's Attorney, draft MDT meeting notes from the meeting held on this date.[43]

11. On ***November 17, 2010***, the Respondent completed an eligibility determination report finding that the student is eligible for special education and related services; and that the student's disability impacts his participation in the general education setting, in the following areas: mathematics, reading, emotional, social, and behavioral development; and written expression.[44]

    The Respondent also completed an Evaluation Summary Report for the student, on this date.[45] The student's *mathematics* teacher reported that the student is performing below grade level in mathematics; the student does not have the grade level pre-requisite skills and has difficulty with multi-step calculations; which often creates problems with the student's ability to complete assignments.[46] The teacher also confirmed the WJ-III Test of Achievement results in mathematics.[47]

    The student's *reading* teacher reported that overall, the student's reading ability is limited; the student has difficulty with word recognition, reading long passages independently, and answering inferential questions.[48] The teacher's report confirms-

[39] Petitioner's Exhibit 18, page 5 of 5.
[40] Respondent's Exhibit 5.
[41] Respondent's Exhibit 5, page 3.
[42] Petitioner's Exhibit 31.
[43] Petitioner's Exhibit 32, page 2.
[44] Petitioner's Exhibit 22.
[45] Id.
[46] Id.
[47] Id.
[48] Id.

findings in the Comprehensive Psychological Evaluation and WJ-III Test of Achievement, that the student tests low in letter-word identification, reading fluency, passage comprehension, and broad reading; and that reading tasks above the 3rd grade level will be difficult for the student.[49]

The student's *written expression* teacher's report confirms findings in the WJ-III Test of Achievement; that tasks measuring effective expression in written language at the 3rd grade equivalent will be quite difficult for the student; and the student's standard scores in the areas of broad written language, spelling, writing fluency, and writing samples place the student's skills in the low range compared to same age peers.[50]

The student's *Social Worker* reported that the student's *unfocused attention level, failure to review work when prompted, failure to complete class work or tests, short concentration; and inconsistent attendance*, are areas of concern.[51]

12. On ***November 19, 2010***, the Office of Special Education (OSE), Compliance Case Manager, emailed to the student's Education Advocate and Petitioner's Attorney, a draft eligibility determination, draft IEP and draft BIP.[52]

13. On ***November 19, 2010***, the Education Advocate drafted a letter to the OSE, Compliance Case Manager, thanking her for the MDT meeting notes and Letter of Invitation, emailed on November 15, 2010; and provide follow-up regarding the student and scheduled MDT meeting, pursuant to a July 14, 2010 settlement agreement.[53] The Education Advocate did not respond to the November 19, 2010 email from the OSE, Compliance Case Manager, transmitting the draft eligibility determination, draft IEP, or draft BIP, forwarded by the Respondent; prior to the December 16, 2010 IEP team meeting.[54]

14. On ***November 22, 2010***, the Respondent forwarded an email to Petitioner's Attorney requesting to reconvene a MDT meeting for the student, and proposed available dates and times, for the meeting.[55] Petitioner's Attorney indicated his availability for the meeting on December 7, 2010; and requested that the Respondent provide written confirmation of the meeting; which the Respondent failed to provide.[56]

15. On ***December 7, 2010***, the Respondent reconvened the student's MDT meeting to review and update the student's IEP and Behavioral Intervention Plan; discuss transportation and compensatory education services.[57]

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[49] Id.
[50] Id.
[51] Id.
[52] Petitioner's Exhibit 32.
[53] Petitioner's Exhibit 23, pages 1 and 2.
[54] Testimony of Education Advocate.
[55] Respondent's Exhibit 10, page 1 of 3.
[56] Respondent's Exhibit 10, page 1 of 3.
[57] Respondent's Exhibit 6.

Neither the Petitioner nor her representative appeared for the meeting.[58] The team drafted an IEP for the student; and agreed to reconvene the meeting to update the IEP, BIP and address any outstanding matters in a prior Hearing Officer's decision.[59]

16. On ***December 16, 2010***, pursuant to a July 14, 2010 Settlement Agreement, the Respondent convened a Multidisciplinary Development Team (MDT) meeting, to review independent Comprehensive Psychological Evaluation, Speech-Language Evaluation, and Functional Behavioral Assessment (FBA); review and revise the student's IEP, if warranted; discuss and determine appropriate location of services, if warranted; and discuss compensatory education services, if warranted.[60] The team also reviewed the student's Behavioral Intervention Plan (BIP).[61]

    The Respondent developed an IEP for the student, prescribing 20 hours of specialized instruction, weekly, in the general education setting, and 30 minutes of behavioral support services, weekly, outside general education; classroom accommodations and modifications; and transportation services.[62]

    The Respondent determined that the student's placement was appropriate because the student was showing progress academically and socially, and adapting satisfactorily; and that compensatory education services was not warranted.[63] The student's Education Advocate expressed disagreement with the Respondent's decision that the student was not entitled to compensatory education services due to the Respondent's delay in completing the requested evaluations.[64]

    The Respondent's meeting notes do not reflect that during this meeting, the student's Education Advocate expressed disagreement or concern regarding the level of specialized instruction services in the student's December 16, 2010 IEP, educational setting, and placement during the 2010/11 school year.[65]

    The Education Advocate developed meeting notes, dated December 16, 2010, expressing disagreement with the level of specialized instruction services in the student's December 16, 2010 IEP, the student's educational setting, and placement; and requesting consistent behavioral support for the student, and compensatory education services due to the Respondent's delay in completing the requested evaluations.[66] However, there is no evidence that the Education Advocate's meeting notes or concerns were communicated by the Education Advocate, to the Respondent.

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[58] Respondent's Exhibit 6.
[59] Petitioner's Exhibit 24, and Respondent's Exhibit 6.
[60] Respondent's Exhibit 7.
[61] Id.
[62] Respondent's Exhibits 2 and 7.
[63] Respondent's Exhibit 7.
[64] Respondent's Exhibit 7.
[65] Id.
[66] Petitioner's Exhibit 25, page 2.

17. On ***December 21, 2010***, the Respondent forwarded to the student's Education Advocate, via email, a ***Prior to Action Notice*** (PNOP) stating that "attached is the PNOP for xxx. Per team's discussion and agreement, xxx remains the appropriate placement for xxx".[67]

18. On ***December 28, 2010***, two (2) days prior to filing this complaint, the Petitioner's Attorney forwarded an email to the Respondent, acknowledging the PNOP; and informing the Respondent that the parent and her representative do not believe the IEP and placement for the student are appropriate; and that it would proceed accordingly.[68]

    The Respondent responded on this date, via email, stating that it was not aware that the parent nor her representative were dissatisfied with the student's current placement; that was never mentioned in meetings for the student; and it would have gladly listened to any objections to the placement and the reasons for concern, however, these concerns were never brought to the attention of the Respondent.[69]

    The Respondent also inquired of the Petitioner's Attorney, the basis for its opinion that the student's placement is inappropriate.[70] The Petitioner's Attorney failed to respond; and instead, filed a due process complaint.[71]

19. On ***December 30, 2010***, the Petitioner's Attorney filed this complaint challenging the level of specialized instruction in the student's December 16, 2010 IEP; and the student's placement, during the 2010/11 school year.[72]

20. **Appropriateness of Student's IEP (Level of Services)**

    The Hearing Officer finds that the December 16, 2010 IEP is inappropriate because the 20 hours of specialized instruction, per week, as recommended in the student's IEP is insufficient to enable the student to access the general education curriculum, and receive educational benefit; because the student requires a full-time special education program, which is not available at his current placement.[73]

    First, the student was initially determined eligible for special education services, in the 2nd grade, and since that time, the student struggles academically and behaviorally in all areas; remains between the 2nd and 4th grade levels with no academic progress; and tasks above the 2.5 grade level prove difficult for the student.[74] In comparing the student's test scores on the WIATT-II, from October 27, 2008; and July 20, 2010, the student made no academic progress, and regressed, academically.[75]

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[67] Respondent's Exhibit 4 and Petitioner's Exhibit 37.
[68] Respondent's Exhibit 4, page 1 of 1.
[69] Petitioner's Exhibit 36, page 1.
[70] Petitioner's Exhibit 36.
[71] Id.
[72] Petitioner's Exhibit 1.
[73] Petitioner's Exhibit 16, testimony of student, parent, Clinical Psychologist, student's special education teachers and Special Education Coordinator.
[74] Testimony of parent, student, Petitioner's Exhibit 16, pages
[75] Petitioner's Exhibit pages 5 and 6.

Second, during recent evaluations the student repeatedly stated;[76] and at this due process hearing the student stated that he is unable to comprehend the educational instruction, and assignments; that either he is not receiving a sufficient level of services, or adequate assistance in the classroom; and the work is "too hard". The student's special education teachers report that the student has made some progress, however, there is no evidence of "meaningful" progress.[77]

Third, the student's Case Manager/Special Education Teacher testified that although the school does not offer pull-out services, he provides the student 1:1 assistance in math, in the classroom, as needed; and pulls the student out of class to provide additional support in math, as needed; while indicating that to providing this student the 1:1 support he requires, it detracts from the support he can provide other students.[78]

The Case Manager/Special Education Teacher also testified that during tests the student does not receive any assistance or support, and is expected to perform independently; although the students' IEP provides that the student will receive classroom accommodations. The Case Manager/Special education testified that he is not aware of the number of hours of specialized instruction prescribed in the student's December 16, 2010 IEP.

The Case Manager/Special Education Teacher also testified that he opines that the student receives educational benefit at his current placement, based on what he observed students receiving at schools for emotionally disturbed students, where he was previously employed. The Case Manager testified that it is the responsibility of the student to complete and turn in assignments; and the student has the option of remaining after school, to receive additional assistance.

Fourthly, according to the ***July 16, 2010 FBA*** the student has difficulty in all areas, and requires an increase in the level of specialized instruction; the ***July 20, 2010 Clinical Psychological Evaluation*** provides that the student requires ***academic concepts to be taught in a class in which he can receive 1:1 support***, to assist in his understanding of the material, and ***strongly*** recommend that the MDT consider an ***increase in the amount of academic support*** the student receives, tutoring or one on one instruction;[79] and the ***August 2, 2010 FBA*** provides that the student is likely to respond positively to 1:1 instruction.[80] In determining the level of services the student requires, the MDT failed to carefully consider the evaluative data.

Finally, the student states that either he does not receive adequate or a sufficient level of specialized instruction support; during evaluation and at the hearing reiterated his need for an increase in the level of specialized instruction support, he receives.[81]

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[76] Petitioner's Exhibit 16, pages 9 and 13, and Petitioner's Exhibit 17, page 9 of 9.
[77] Testimony of student's special education teachers.
[78] Student's Case Manager and special education teacher.
[79]
[80] Petitioner's Exhibit 18, page 5 of 5.
[81] Petitioner's Exhibit 16, page 13.

21. **Appropriateness of Student's IEP (Educational Setting)**

The Hearing Officer finds that the December 16, 2010 IEP is inappropriate because it is not reasonably calculated to provide the student educational benefit, because the nature and severity of the student's disabilities are such that education in the general education setting cannot be accomplished satisfactorily, even with the use of supplementary aids and services; and the student requires education outside the general education setting, which is not available at the student's current placement.

The Hearing Officer finds that the student's December 16, 2010 IEP is not individualized and specifically tailored to address the unique educational needs of this student, however, is based upon the educational program which is available, and which the student's current placement can provide the student.

At the time of the student's enrollment in October, 2010, the school was presented with the student's June 18, 2010 IEP, from his prior school; and was aware that the IEP prescribes 15 hours of specialized instruction, weekly, outside the general education setting.[82]

The school was also aware that educational setting available at the school is an inclusion setting; and that the school is unable to provide the student education outside the general education setting, as prescribed in his June 18, 2010 IEP.[83] However, because the school has a policy that students requesting admission to the school, cannot be denied admission, the school accepted the student at the school; and adjusted the student's June 18, 2010 IEP, to reflect the program available at the school; because the school can only offer the student an inclusion setting; and the IEP was not revised to reflect the student educational needs.[84]

The Hearing Officer finds that the IEP is not based on the recent Comprehensive Psychological Evaluation and Functional Behavioral Assessments; and in developing the student's December 16, 2010 IEP, the MDT failed to carefully consider the findings and recommendations in these evaluations.

According to the evaluations, the student exhibits average to below average cognitive functioning; has difficulties in math, reading, and written expression; and secondary to a prior diagnosis of ADHD, the student presents with inattention and distractibility in class.[85] The evaluations also indicate that the student has difficulty comprehending school work and has failing grades; and appears to struggle with managing the symptoms of ADHD, particularly inattention, in the classroom, which interferes with his ability to learn.

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[82] Testimony of SEC, and student's special education teacher.
[83] Id.
[84] Testimony of student's special education teacher and SEC; and Respondent's Exhibit 2..
[85] Petitioner's Exhibit 19, page 4 of 5.

The ***July 16, 2010 FBA*** provides that the student has difficulty in all areas, requires education in a class with a small student to teacher ratio. The ***July 20, 2010 Clinical Psychological Evaluation*** provides that the student requires ***academic concepts to be taught in a class in which he can receive 1:1 support***, to assist in his understanding of the material.[86] The ***August 2, 1010 FBA*** provides that the student requires more structure and supervision to ensure that he attends classes and completes class work and homework; and 1:1 instruction. The MDT failed to carefully consider this information in determining the student's educational setting.

The student's inability to function in a general education setting; and need for a more restrictive academic setting, is evidenced by his failure to progress academically, throughout his education. The student has made minimum to no progress academically, mostly due to his inattentiveness and distractibility. When questioned regarding his off task behavior in the classroom at his prior school, where he received 10 hours of specialized instruction, weekly, outside the general education setting, the student reported that "the work is too hard, and when I got bored, I would talk."[87]

The student reported that the work was too difficult, at his prior school; and that he was disciplined for talking in the classroom at least once a week; and admits to difficulties with attention in the classroom, and staring into space.[88]

The student received 15 hours of specialized instruction, outside the general education setting, at his prior school, however, his inattentiveness and distractibility adversely impacted his learning, because the student's class included up to 20 students; and the high occupancy class made it difficult for the teacher to provide the student the attention he required to access the general education curriculum; and ensure that he remained on task.[89] The student's current class consists of approximately 15 students;[90]therefore, at the time of the students' enrollment, it was more probable than not that the student would not progress and would regress in the inclusion setting, at his current placement. However, the Respondent placed the student in the inclusion setting.

At the hearing, the student reports that the "work is too hard" at his current placement, and he does not comprehend the information provided by the teachers, his homework or classroom assignments; and that he could benefit from more individualized support. The student's difficulties with inattentiveness and distractibility have hindered the student's access to the general education curriculum and the student's ability to receive 'meaningful' educational benefit.

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[86]

[87] Petitioner's Exhibit 16, page 3.

[88] Id.

[89] Petitioner's Exhibit 16, page 13.

[90] Testimony of SEC.

22. **Appropriate Placement (Location of Services)**

It is the Hearing Officer's decision that the Petitioner satisfied its burden of proof by presenting evidence that the District of Columbia Public Schools denied the student a free appropriate public education, because during the 2010/11 school year, it failed to fulfill its ***substantive*** obligations under the IDEA, by providing the student an appropriate placement, because the ***location of services*** identified in the student's December 16, 2010, is unable to provide the student the full-time special education program, outside general education, which he requires to access the general education curriculum, and receive 'meaningful' educational benefit; in violation of the IDEA, at 34 C.F.R. §300.114(a)(2)(ii), 300.116, and 300.513.[91]

When a public school system has defaulted on its obligations under the IDEA, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits."[92] Special classes, separate schooling or other removal of children with disabilities from the regular education environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, as in this case.[93]

The Respondent defaulted on its obligations under the IDEA, to ensure that this student receive a FAPE, while attending District of Columbia Public schools. Therefore, maintaining the student's current placement would be a grave disservice to this student, who has been without an appropriate educational program and placement for a significant period of time.

The nature and severity of this student's disabilities; and the needs of the student, clearly support an alternative placement, in a more restrictive educational setting. The student requires a small structured therapeutic environment, with a small student to teacher ratio, where the student can receive 1:1 academic support throughout the school day; positive rewards and reinforcements for his behavior; with minimum distractions and stimuli, which is not available at the student's current placement.[94]

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[91] Petitioner's Exhibits 16, pages 5-18, and Petitioner's Exhibit 17, pages 8-9; and Petitioner's Exhibit 18, pages 4 of 5, and 5 of 5.

[92] Florence County School District Four, et al. v. Shannon Carter, 510 U.S. 7 (1993).

[93] Letter to Tom Trigg.

[94] Petitioners' Exhibits 16, pages 3, 5, 6, 7, 8, 9, 10, 13, 14, 15; Petitioner's Exhibit 17, pages 5-9; and Petitioner's Exhibit 18, pages 4 and 5 of 5; and testimony of Clinical Psychologist.

23. **Alternative Placement.**

The Hearing Officer finds that the Petitioner satisfied its burden by proving that the student's current placement is inappropriate; and the student requires an alternative placement.[95] The Petitioner proposes the of Prince George's County, as an alternative placement for the student. Although requested by this Hearing Officer, the Respondent presented no alternative placements, for the student; or for the Hearing Officer to consider.

The of Prince George's County is an independent, non-profit school located in Lanham, Maryland, for students with multiple disabilities, including learning disabilities, and Other Health Impaired (OHI). The school serves approximately 80 students, and 45 of the student are from the District of Columbia. The school offers students a small structured therapeutic environment, each class consists of approximately 8-10 students, and has a teacher and teacher's assistance. The school offers students a reading resource teacher, speech/language and occupational therapy services, and behavioral support services. The student population consists of students grades 2-12.

The class identified for the student consists of 7 9th grade students, the teachers are certified in special education, and content areas; ages of the students in the class are 15 and 16, and the disability classifications of the student are learning disabled, OHI, and speech impaired. The cognitive functioning of the students in the class identified for the student, is between the 2nd and 3rd grades in several areas. The school utilizes the DCPS and Prince George's County educational curriculum; and the DCPS has a liaison present at the school daily, to work with the school, conduct observations, assists in IEP development, professional development, and student transition.

The school has a 100% graduation rate. Students eat in the cafeteria together, the school has a men's group, year book staff, basketball and football teams, and science fairs. The cost of the school is per year, and related services are per unit of services.

The Hearing Officer finds that the school can provide the student the full-time special education program, outside general education, which he requires to access the general education curriculum; and the school can provide the student 'meaningful' educational benefit.

[95] Testimony of parent and the Transitions Director at the

VII. 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 proof is properly placed on the Petitioner, the party seeking relief in this matter.[96] Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.[97]

2. The Individuals with Disabilities Education Act ("IDEA")[98] is the federal statute governing the education of students with disabilities.[99] The IDEA requires that all children with disabilities have available to them a free appropriate public education ("FAPE"), that emphasizes special education and related services, specifically designed to meet their unique needs; and prepare them for further education, employment, and independent living. *See, 20 U.S.C. §1400(d)(1)(A)*.

   Specially designed instruction means 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.[100]

3. The IDEA defines a FAPE as special education and related services provided at public expense, under public supervision and direction, and without charge; meet the school standards of the State educational agency; includes an appropriate preschool, elementary school, or secondary school education in the State involved.

   The IDEA also provides that the special education and related services must be provided in conformity with an Individualized Education Program (IEP) that meets the requirements of §§300.321 through 300.324.[101]

   In the District of Columbia, the local education agency (LEA) must ensure that *all children with disabilities*, between the ages of 3 and 21, have available to them a free appropriate public education (FAPE); that emphasizes special education and related-

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[96] *Shaffer v. Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C.M.R. §3030.3.
[97] 20 U.S.C. §14115(i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir.2005) (standard of review)
[98] The IDEA is reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) Public Law 108-446 and 20 U.S.C. §1400 et seq..
[99] The Federal regulations promulgated under the IDEA, are codified at 34 C.F.R. Part 300.
[100] IDEA, 34 C.F.R. §300.39 (b)(3)(i)(ii).
[101] IDEA, 34 C.F.R. §300.17(d).

services designed to meet their unique needs and prepare them for further education, employment, and independent living. This student is a child with disabilities entitled to receive special education and related services, under the IDEA; and District of Columbia Municipal Regulations.

4. The U.S. Supreme Court has held that the FAPE required by the IDEIA consists of an educational program specifically tailored to address the unique needs of the student by means of an 'individualized education program' (IEP).[102]

   According to *Rowley*, in order for FAPE to be offered a student, the school district must show it complied with the statutory elements of an IEP, and the goals and objectives in the IEP are reasonable, realistic and attainable. The FAPE requirement is satisfied when the State provided personalized instruction that is reasonably calculated to enable the child to benefit educationally; and is likely to produce progression, not regression.[103]

5. **Decision of a Hearing Officer on the Provision of a FAPE.**

   Subject to paragraph (a) (2) of §300.513, a Hearing Officers' determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child failed to receive a FAPE only if the procedural violations impacted the parent or child's substantive rights.

   When parents challenge the appropriateness of a program or placement offered to their disabled child by a school district under the IDEA, a Hearing Officers must undertake the following two-fold inquiry: 1) procedural compliance; and 2) substantive compliance.

   In this matter, the Petitioner failed to allege, that the Respondent failed to comply with the procedural requirements of the IDEA, or that procedural violations impacted the student and/or parent's substantive rights, however, the Petitioner represents that in developing the student's December 16, 2010 IEP, the Respondent failed to comply with the substantive requirements of the IDEA, by failing to ensure that the IEP is reasonably calculated to enable the student to receive educational benefit; and that the IEP is ***appropriately designed and implemented***, emphasizing special education and related services specifically designed to meet the student's unique needs, supported by such services, as are necessary to provide the student 'meaningful', benefit.

   (1) Procedural FAPE (Procedural Compliance).

   First, the Hearing Officer must determine whether the State complied with the *procedural requirements* of the IDEIA, in creating and implementing the student's IEP, or rendering the placement decision. However, the 2004 amendments to IDEA, at Section 615(f) (ii) specifically limit the jurisdiction of administrative hearing officers to make findings that a child failed to receive a FAPE due to procedural violations, unless it can be determined that the procedural violations:

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[102] Id.

[103] Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley, 458 U.S. 176 (1982).

(I) impeded the child's right to a free and appropriate public education;
(II) significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
(III) caused a deprivation of educational benefit to the student.

(2) Substantive FAPE (Conferral of Some Educational Benefit).

Second, once the Hearing Officer addresses the first criteria, it must determine whether the State complied with the *substantive requirements* of the IDEA, by developing an IEP for the student that is ***reasonably calculated to enable the student to receive educational benefit.*** While a student's IEP must be reasonably calculated to provide a student educational benefit, school districts are required to provide only a "basic floor of opportunity." Rowley, 458 U.S. at 200-01. Thus, an "appropriate' public education does not mean the absolutely best or potential-maximizing education for the individual child. Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (1987). However, the benefit cannot be trivial, *Rowley*, 458 U.S. 176, at 177 206-207.

The IEP ***must be appropriately designed and implemented***, emphasizing special education and related services specifically designed to meet the student's unique needs, supported by such services, as are necessary to provide the student 'meaningful', benefit. If these two (2) requirements are satisfied, the State has complied with the obligation imposed by Congress, and the courts can require no more.

6. **Appropriateness of Student's IEP (Level of Services)**

It is the Hearing Officer's Decision that the Petitioner satisfied its burden by proving that the District of Columbia Public Schools failed to develop an appropriate Individualized Education Program (IEP) for the student on December 16, 2010, because it failed to comply with the ***substantive*** requirements of the IDEA, by ensuring that the level of specialized instruction services in the IEP is sufficient to provide the student access the general education curriculum; and educational benefit, in violation of the IDEA, at 34 C.F.R. §§300.320, 300.324, and 300.513.

The Respondent failed to comply with the ***substantive requirements*** of the IDEA, by failing to ensure that in developing the student's December 16, 2010 IEP, the IEP team carefully considered the strengths of the child; concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; the academic, developmental, and functional needs of the child; and the potential harm on the student, by failing to provide the student an appropriate IEP.[104]

[104] IDEA, at 34 C.F.R. §300.324(a)(1)(iv).

The Respondent failed to develop an appropriate IEP for the student that is reasonably calculated to enable the student to receive educational benefit; and the IEP is not ***appropriately designed***, emphasizing special education and related services specifically designed to meet the student's unique needs, supported by such services, as are necessary to provide the student 'meaningful', educational benefit. The Respondent failed to satisfy these two (2) requirements, thus, it failed to fulfill its obligation under the IDEA.

7. **Appropriateness of Student's IEP (Educational Setting)**

It is the Hearing Officer's decision that the Petitioner satisfied its burden of proof by presenting evidence that in developing the student's December 16, 2010 IEP, the District of Columbia Public Schools failed to comply with the ***substantive*** requirements of the IDEA, because the IEP recommends education of the student in the general education setting, although the nature and severity of the student's disability is such that education of the student in the general ***education setting*** cannot be accomplished satisfactorily, - even with the use of supplementary aids and services; and the student requires education outside the general education setting; in violation of the IDEA, at 34 C.F.R. §§300.320, 300.324 (a)(1)(iv), and 300.513.

At the time of the student's enrollment, the Respondent was aware that it was unable to provide the student education outside the general education setting, as prescribed in his June 18, 2010 IEP, and that since the beginning of the 2010/11 school year, the student failed to progress in the inclusion setting, however, instead of placing the student in a more restrictive setting, it disregarded the needs of the student and maintained the student's placement in the inclusion setting, where he continued to regress academically and behaviorally.

For these reasons, the Respondent failed to develop an appropriate IEP for the student that is ***reasonably calculated to enable the student to receive educational benefit***; and the IEP is not ***appropriately designed***, emphasizing special education and related services specifically designed to meet the student's unique needs, supported by such services, as are necessary to provide the student 'meaningful', benefit. The Respondent failed to satisfy these two (2) requirements, thus, it failed in its obligations to provide the student a FAPE, under the IDEA.

8. **Appropriate Placement (Location of Services)**

It is the Hearing Officer's decision that the Petitioner satisfied its burden of proof by presenting evidence that the District of Columbia Public Schools denied the student a free appropriate public education, because during the 2010/11 school years, it failed to fulfill its ***substantive*** obligations under the IDEA, by providing the student an appropriate placement, because the ***location of services*** identified in the student's December 16, 2010 IEP, is unable to provide the student the full-time special education program, outside general education, which he requires to access the general education curriculum, and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §300.114(a)(2)(ii), 300.116, and 300.513.

The IDEA provides that each public agency must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be accomplished satisfactorily.[105]

The IDEA also provides that the placement decision must be made by an IEP team, including the parent; is made in conformity with the least restrictive environment (LRE) provisions; is determined at least annually; is based on the child's IEP; is as close as possible to the child's home; and unless the student's IEP requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.[106]

When a public school system has defaulted on its obligations under the IDEA, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits."[107] Special classes, separate schooling or other removal of children with disabilities from the regular education environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, as in this case.[108]

The Respondent defaulted on its obligations under the IDEA, to ensure that during this student's education in the DCPS, the student received a FAPE. Therefore, maintaining the student's current placement would be a disservice to this student. The needs of the student clearly support an alternative placement.

VIII. COMPENSATORY EDUCATION SERVICES

The Petitioner satisfied its burden by proving that the District of Columbia Public Schools denied the student a free appropriate public education, by failing to provide the student an appropriate IEP and placement during the 2010/11 school year, entitling the student to compensatory education services from the beginning of the school year through the date of this decision.

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that she is receiving only a de minimis benefit and fails to correct the situation, as in this case. *M.C. on behalf of J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

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." *See G. ex rel. RG v. Fort Bragg Dependent Schs. 343 F.3d 295, 308 (4th Cir. 2003)*.

[105] IDEA, at 34 C.F.R. §30.114(a)(2)(ii).
[106] IDEA, at 34 C.R. §300.116(a)(2) (b)(2).
[107] Florence County School District Four, et al. v. Shannon Carter, 510 U.S. 7 (1993).
[108] Letter to Tom Trigg.

Its purpose is to help the child make the progress that he/she would have made if an appropriate program had been available. The specific services provided must be tailored to the child's needs. Compensatory education can mean extra instruction or related services (such as therapies) provided during the school year or summer.

According to *Mary McLeod Bethune Day Academy PCS v. Terri Bland, Civil Action No. 07-1223 (2008)*, a compensatory education award is an equitable remedy that "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." *Reid*, 401 F.3d at 518, 523.

Compensatory education is not a contractual remedy, but an equitable remedy that is part of the court's resources in crafting appropriate relief. *Reid v. District of Columbia, 401 F.3d 516.523 (D.C. Cir. 2005)*.

The IDEA empowers Hearing Officers with considerable discretion when fashioning a remedy. 20 U.S.C. § 1415(i)(2)(C)(iii) (the Hearing Officer "shall grant such relief as the Hearing Officer determines is appropriate.") However, a Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with "insight about the precise types of education services [the student] needs to progress." *Branham, 427 F.3d at 12.*

Relevant evidence includes "the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive environment." Id. In *Nesbitt,* the Court found that an "award was not adequately individualized or supported by the record", when the Hearing Officer was not provided with any information regarding the student's current grade level of functioning.

Reid provides that a compensatory education "award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F. 3d at 524. *(D.C. Cir. 2005)*. This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity." According to *Reid*, in crafting an appropriate remedy for denial of FAPE, the Hearing Officer must engage in a fact intensive analysis that is qualitative rather than quantitative. *Branham v. D.C., 427 F.3d 7, 11 (D.C. Cir 2005); Reid, 401 F.4d at 524*. The amount of compensatory education is calculated by finding the period of deprivation of special education services; and excluding the time reasonably required for the school district to rectify the problem. *M.C. v. Cent. Reg'l. Sch. Dist.*, 81 F.3d at 397.

Reid also stresses that the Hearing Officer must take into account individual individualized assessments of the student so that the ultimate award is tailored to the student's unique needs; and must be reasonably calculated to provide the student the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. The crafting of an award of compensatory education under IDEA simply cannot be nebulous; and an arbitrary compensatory education award will never pass muster under the *Reid* standard.

In *Reid*, the Court rejected the "cookie-cutter" or mechanical remedies, such as awarding one hour of compensatory instruction for each hour that the student was denied FAPE. As the D.C. Circuit recognized in Reid: "Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE." *Reid*, 401 F.3d at 524. At a minimum, *Reid* demands that an award not be based on an arbitrary number, however, the number of hours proposed in the Petitioner's compensatory education plan, and as offered by Petitioner's compensatory education witness appear to be arbitrary, without any basis or foundation for the requested number of hours of tutoring.

The court explains further that there is no obligation to provide a day for day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. A compensatory award constructed with the aid of a formula is not per se invalid, and a formula-based award may in some circumstances be acceptable if it represents an individually tailored approach to meet the student's unique prospective needs.

In this matter, it is the Hearing Officer's decision that the violation in this matter significantly impacted the student's substantive rights, resulting in denial of a FAPE, and the student's entitlement to compensatory education services. It is also the Hearing Officer's decision that in crafting an appropriate remedy, the Hearing Officer must accept the student as she finds him, therefore, she must consider the totality of facts surrounding the student's education, the student's educational needs, the period of time the student has been without an appropriate IEP and placement; the fact that the student is in the 9th grade, performing between a 2nd-4th grade level in most areas, and has approximately three (3) years of education remaining; and the services necessary to place the student in the position he would have been had the violation not occurred.

Considering all of these factors, it is the Hearing Officers' Decision that equity dictates that the Hearing Officer crafts an appropriate compensatory education award, to compensate the student for the past violation. *Heather D. v. Northampton Area Sch. Dist., 48 IDELR 67 (E.D. Pa. 2007).*

The following services are tailored to the student's unique needs; and are reasonably calculated to provide the student educational benefits that likely would have accrued had the violation not occurred; and are intended to mitigate any harm the student may have suffered as a result of the violation:

Compensatory Education Services Plan

(1) Evaluations

Within fifteen (15) school days of this decision and order, the Respondent shall issue an independent educational evaluation letter authorizing a Psychiatric Evaluation, to determine the student's need for medication, to address his ADHD.

Within ten (10) calendar days of receiving the evaluation, the Respondent shall convene an IEP team meeting with the parent and/or parent's representative, representatives from the student's new school, to review the evaluation and revise the student's IEP, consistent with the findings and recommendations in the evaluations.

(2) IEP

The students December 16, 2010 IEP is revised to reflect that the student will receive 27.5 hours of specialized instruction, *outside* general education; and two (2) hours of behavioral support services, weekly.

Within fifteen (15) school days from the date of this decision and order, the Respondent shall convene an IEP team placement meeting with the parent and/or the parent's representative, for the purpose of:

- revising the December 16, 2010 IEP to reflect that the student will receive 27.5 hours of specialized instruction, ***outside*** general education; and two (2) hours of behavioral support services, weekly;

- developing and/or revising the student's IEP and Behavioral Intervention Plan (BIP), to address the student's inattention/off task behaviors, inability to complete independent tasks, due to low academic skills as well as inattention; and

(3) Independent Tutoring Services

The Respondent shall fund a Lindamood-Bell Diagnostic Learning Evaluation, at the cost of to determine the student's specific strengths and weaknesses in language and literacy skills (reading, mathematics, reading comprehension, and written language skills); and 120 hours of tutorial services, in areas of need identified in the Lindamood-Bell Diagnostic Evaluation; and to remediate the student's deficits in reading, mathematics, reading comprehension, written language skills, and assist the student in learning specific comprehension strategies such as reading for the main idea and using context clues to determine word meaning.

The tutorial services may be provided at the student's school, at the end of each school day; at a and/or at a Summer Clinic; and the student has until the end of the 2011/12 school year, to utilize the tutorial services. The Respondent shall provide the student transportation for the student to attend the after school tutoring, if the tutoring is not at the student's school, and/or Summer clinic.

(4) Behavioral Support Services

The student's December 16, 2010 IEP is revised to reflect two (2) hours of individual counseling, per week, to assist the student in processing his discordant feelings regarding his academic difficulties; learn effective measures to express himself when needed, rather than isolating himself when upset; understand how his disabilities interfere with his ability to function in the classroom; and assist him in addressing his school attendance.

IX. ORDER

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

1. **ORDERED**, that within ten (10) calendar days from the date of this decision and order, the Petitioner and student shall visit, tour, and the student shall observe and the student shall participate in an academic class at of Prince George's County; and within two (2) school days of the visit, shall provide the Respondent written notice of the petitioner's decision that the student intends or does not intend to attend the school for the remainder of the 2010/11 school year, and 2001/12 school year; and it is further

2. **ORDERED**, that within fifteen (15) school days from the date of Petitioner's notice to Respondent, the Respondent shall convene an IEP team placement meeting with the parent and/or the parent's representative, for the purpose of:

(a) issuing to the parent a Prior Notice of Placement, reflecting the Respondent's funding of the student's placement, academic and related services, and transportation, for the student to attend of Prince George's County, Maryland, for the remainder of the 2010/11 school year; and the 2011/12 school year; or

(b) identifying an alternative placement for the student, consistent with this decision and order, and issuing to the parent on this date, a Prior Notice of Placement to the alternative placement; and it is further

3. **ORDERED**, that should the parent fail to comply with paragraph 1 of this order, the Respondent shall convene a IEP team placement meeting with the parent and/or parent's representative, consistent with paragraph 2 (b) of this order; and it is further

4. **ORDERED**, that this decision and order are effective immediately.

X. 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).

Date: *March 5, 2011*

Ramona M. Justice

Attorney Ramona M. Justice, Hearing Officer